

EXHIBIT 20
Redacted-Public Version

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

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NETWORK PROTECTION SCIENCES,
LLC,

Plaintiff,

vs.

Case No. 3:12-CV-01106-WHA

FORTINET, INC.,

Defendant.

_____/

30(b)(6) AND INDIVIDUAL
DEPOSITION OF TODD NELSON
Wednesday, June 26, 2013

REPORTED BY:

HOLLY MOOSE, CSR NO. 6438
RPR-RMR-RDR-CRR-CCRR-CLR

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1 A P P E A R A N C E S

2

3 FOR THE PLAINTIFF:

4 GIBBONS P.C.
BY: MICHAEL CUKOR, ESQ.
5 One Pennsylvania Plaza, 37th Floor
New York, New York 10119
6 (212) 613-2013
mcukor@gibbonslaw.com
7

8 FOR THE DEFENDANT:

9 QUINN, EMANUEL, URQUHART & SULLIVAN
BY: WILLIAM COOPER, ESQ.
10 50 California Street, 22nd Floor
San Francisco, CA 94111
11 (415) 986-5700
willcooper@quinnemanuel.com
12

13 ALSO PRESENT: Gary Brewer, Videographer

14

TAKEN AT:

15

QUINN, EMANUEL, URQUHART & SULLIVAN
16 50 California Street, 22nd Floor
San Francisco, CA 94111
17 (415) 986-5700
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1 I N D E X

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3 DEPOSITION OF TODD NELSON

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3 Todd Nelson In Support Of
4 Defendants' Motion To
5 Transfer Venue To The
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7 California, 2 pages

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1 BE IT REMEMBERED that, pursuant to Notice
2 and on Wednesday, June 26, 2013, commencing at the
3 hour of 10:06 a.m., before me, HOLLY MOOSE, CSR No.
4 6438, a Certified Shorthand Reporter in the State of
5 California, there personally appeared

6

7 TODD NELSON,

8

9 called as a witness by the Plaintiff, who, having
10 been first duly sworn, was examined and testified as
11 hereinafter set forth:

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1 June 26, 2013

10:06 A.M.

2 P R O C E E D I N G S

3 ---o0o---

4 THE VIDEOGRAPHER: Good morning. We are
5 going on the record.

6 My name is Gary Brewer, certified legal
7 specialist, in association with the court reporter,
8 Holly Moose. I am the videographer on June 26th,
9 2013, for the recording of the deposition of
10 Todd Nelson, being taken at 50 California Street,
11 San Francisco, California, at the time of
12 10:06 a.m., in the matter of Network Protection
13 Sciences, LLC versus Fortinet, Inc.

14 Will counsel please identify themselves for
15 the record, beginning with the plaintiff's counsel.

16 MR. CUKOR: I am Michael Cukor, from
17 Gibbons PC, for the plaintiff, Network Protection
18 Sciences.

19 MR. COOPER: Will Cooper, with Quinn
20 Emanuel, representing the defendant, Fortinet.

21 THE VIDEOGRAPHER: Will the reporter please
22 identify herself and swear in the witness.

23 (Witness sworn.)

24 THE VIDEOGRAPHER: Please begin.

25 ///

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1 TODD NELSON,
2 having been first duly sworn, testified as follows:

3 EXAMINATION BY MR. CUKOR

4 MR. CUKOR: Q. Good morning.

5 A. Good morning.

6 Q. Please state your name for the record.

7 A. Todd Nelson.

8 Q. And what is your address?

9 A. Home or work?

10 Q. Home, please.

11 A. [REDACTED]

12 [REDACTED]

13 Q. And how long have you lived there?

14 A. About ten years or 11 years, 12 years.

15 Something like that.

16 Q. And are you currently employed?

17 A. Yes.

18 Q. Who are you employed by?

19 A. Fortinet, Inc.

20 Q. Just Fortinet, Inc.?

21 A. Yes.

22 Q. Okay. Does Fortinet, Inc. have
23 subsidiaries?

24 A. Yes.

25 Q. But you are only employed by Fortinet,

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1 Inc., right?

2 A. Correct.

3 Q. And how long have you been employed by
4 Fortinet, Inc.?

5 A. Eight years.

6 Q. What subsidiaries does Fortinet, Inc. have?

7 A. The -- I'm not sure of the complete list.
8 I think it's a relatively long list. I could list a
9 few.

10 Q. But you're not sure?

11 A. Correct.

12 Q. Why does it have so many subsidiaries?

13 A. I don't understand the question.

14 Q. What part? Why does Fortinet, Inc. have so
15 many subsidiaries?

16 A. I -- I -- you know, I don't know the answer
17 to that question.

18 Q. Okay. And in what capacity are you
19 employed?

20 A. I am -- my title is VP legal. Fairly
21 generically.

22 Q. And how long has that been your title?

23 A. Since the beginning, though I had a longer
24 title in the beginning.

25 Q. What was your longer title?

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1 A. I was also general counsel, and I believe I
2 was corporate secretary as well.

3 Q. And are you still general counsel?

4 A. No.

5 Q. What did you do before you were employed by
6 Fortinet?

7 A. I was a lawyer at a law firm.

8 Q. Was that Wilson Sonsini?

9 A. Yes.

10 Q. And how long were you with Wilson Sonsini?

11 A. Since the time I graduated from law school
12 in '97, with a short leave of absence in '98-'99
13 time frame.

14 Q. And what, generally, did you do at Wilson
15 Sonsini?

16 A. I -- it moved around during the time that I
17 was there. I was in different departments.

18 Q. What departments?

19 A. I started out -- when I first started,
20 working in the litigation department and splitting
21 my time between intellectual property litigation,
22 commercial litigation and some securities
23 litigation.

24 After I got back from my LLM studies, I
25 started in a corporate group. And I was there for a

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1 number of years, until the -- sort of the dot-com
2 burst -- bubble burst, whatever you -- I've
3 forgotten the exact timing of that. Maybe around
4 2000, 2001.

5 Then I began to split my time back with the
6 litigation department. The IP litigation department
7 specifically.

8 And then at some point, I don't recall the
9 exact date, I shifted back to the IP litigation
10 department full-time.

11 Q. You completed your LLM at Yale?

12 A. Yes.

13 Q. And what was that in?

14 A. There's no specific topic. At Yale you --
15 you essentially write your own proposal, write your
16 own -- you know, propose your own thesis, create
17 your course load.

18 Q. What was your thesis?

19 A. It's a -- I actually don't call it a
20 thesis. You call it -- that was back to Ph.D. time.
21 It's more of a -- sort of a graduate paper, but
22 similar in -- to a thesis.

23 It was -- it was a paper on Internet
24 value -- value -- company valuations during the
25 Internet boom and the -- questioning the valuation

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1 methodologies that were -- the unique new method --
2 valuation methodologies that were being employed
3 during the run-up, during the dot-com boom.

4 Q. Did it deal with valuation of intellectual
5 property?

6 A. Not directly, no.

7 Q. Do you have a Ph.D.?

8 A. No.

9 Q. Did you study for one?

10 A. I -- I started a -- in a Ph.D. program at
11 University of Chicago and then fairly quickly took a
12 leave of absence -- you know, began to take leave of
13 absences.

14 We had -- my wife was in school, and we had
15 run out of money. And I began consulting as an
16 engineer and took a series of leave of absences for
17 a number of years and didn't end up completing the
18 Ph.D.

19 Q. What program was it in?

20 A. Computer science.

21 Q. Are you trained in your undergraduate
22 studies as a computer science engineer?

23 A. In undergrad, my major was -- agricultural
24 managerial economics, I think, was the exact title.
25 And I had sort of a minor -- you know, a focus on

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1 mathematics and computer science.

2 Q. Any more formal training in computer
3 science?

4 A. I did a master's in computer science at San
5 Jose State -- University of -- no, Cal State
6 University, San Jose.

7 Q. Any other computer science formal training?

8 A. No.

9 Q. Ever do any patent prosecution?

10 A. I run the patent program. I set up the
11 patent program and run the patent program at
12 Fortinet, but I don't -- so I'm responsible for the
13 prosecution of patents, but I don't draft patents
14 myself. I review applications and lead the effort.

15 Q. Do you have a patent registration number?

16 A. No.

17 Q. Did you ever take the Patent Bar?

18 A. No.

19 Q. How come?

20 A. I thought about it a number of times,
21 particularly during the downturn, but I -- I don't
22 think that patent prosecution is -- I never
23 thought -- felt that that was sort of what I wanted
24 to do long-term.

25 Q. Okay. I think you mentioned that you set

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1 up the patent program at Fortinet. Is that
2 accurate?

3 A. I believe that's what I said.

4 Q. Is it -- is it true that you set up the
5 patent program at Fortinet?

6 A. Yeah. I mean, depending on what you mean
7 by "set up."

8 When I started at Fortinet, there were no
9 issued patents. And there were a handful, I can't
10 remember how many, of patent applications that had
11 been filed that were scattered around with a number
12 of different prosecution firms. There was no patent
13 committee. So it was -- there was the beginnings,
14 but it was a fairly random, unstructured effort.

15 I set up the patent committee and
16 structured the effort and have led that effort since
17 that time.

18 Q. Has that been successful?

19 A. It depends on how you would -- what the
20 threshold for determining success would be, I
21 suppose.

22 Q. Do you consider it successful?

23 A. I do consider it successful.

24 Q. And what is the threshold for success
25 you're using?

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1 A. Just my own personal pride in -- in the --
2 the -- the -- the -- you know, sort of my own
3 personal qualitative analysis of the -- of the
4 patents and the -- the interaction with the
5 inventors and the -- the ideas that have come out of
6 the patent program.

7 Q. I think you said -- or used the expression
8 or term, "patent committee." Is that the right
9 term?

10 A. Yeah, yes.

11 Q. Who was on the patent committee at
12 Fortinet?

13 A. That moves around. I believe I'm formally
14 on it, though more as sort of an oversight. It's --
15 it's really largely driven by engineering. The head
16 for many years was Andrew "Kreveniek." I can't
17 possibly spell that last name.

18 There was a change a couple years ago, and
19 the new head, I believe, is -- I believe it's
20 "Diyung" -- I can't recall the pronunciation or the
21 spelling of the last name.

22 Q. And what is the charge of the patent
23 committee?

24 MR. COOPER: I'm going to just caution the
25 witness not to reveal any attorney/client-privileged

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1 information.

2 THE WITNESS: So -- so "charge," you mean
3 charter, just the general set of goals or --

4 MR. CUKOR: Yes.

5 THE WITNESS: I mean, the patent committee,
6 it's fairly standard patent committee for -- for
7 companies. But the -- the charter is to solicit
8 from the engineering staff and the broader audience
9 at Fortinet -- to solicit ideas, invention
10 disclosures, to grade the invention disclosures and
11 to recommend prosecution for -- for invention
12 disclosures that the patent committee believes
13 rises -- rises to the level of something that should
14 be prosecuted.

15 MR. CUKOR: Q. Did anyone at Fortinet
16 invent the first transparent application layer
17 firewall?

18 A. I don't believe that's the case, but I
19 couldn't say. I don't know the entirety --
20 that's -- I think that's incredibly ambiguous as to
21 what that means and who would have invented it. I
22 think that's a little like saying did anyone at
23 Fortinet invent the Internet. I -- you know, who
24 invented the Internet?

25 Q. Do you know who the first person to invent

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1 the first transparent application layer firewall
2 was?

3 A. What do you -- what do you mean by trans --
4 actually, what's the term you used again? I'm
5 sorry.

6 Q. Transparent application layer firewall.

7 A. I mean, what do you mean? I mean, that --
8 we could -- you could ask ten different engineers
9 what a transparent application layer firewall, and
10 you'd probably get ten -- ten different answers.
11 And if you asked a marketing person, you'd probably
12 get another answer. So I'm not sure exactly what
13 that is, so --

14 Q. Do you have a definition you can offer for
15 what a transparent application layer firewall is?

16 A. What do you mean, that I can offer?

17 Q. Do you -- do you have a understanding in
18 your head of -- well, you know what a firewall is?

19 A. Personally. I have my own concept of what
20 a firewall is.

21 Q. Okay. And do you have a concept of a
22 transparent firewall?

23 A. You know, I don't hear and I don't use
24 those terms together, "transparent firewall." I
25 think of a firewall as a firewall. I don't think of

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1 it in connection with the term "transparent."

2 Q. So do you have no understanding of what
3 that means?

4 A. I have a general concept in computer
5 science, when you refer to something as
6 "transparent," what that would mean.

7 Q. Okay.

8 A. So I could -- I could add that to a -- you
9 know, a firewall is -- you know, to -- sort of my --
10 you know, my personal concept of what I think a
11 firewall is.

12 Q. Okay. So doing that, and do you have a
13 concept of what a firewall that operates at the
14 application layer is?

15 A. Again, I -- I'm not trying to be -- you
16 know, avoid the question, but what does it mean to
17 be operating at the -- at the application level?
18 Does it not operate at any other level? Is it
19 something that is capable of operating? And -- and
20 what functionality would -- would qualify as
21 operating?

22 Q. Capable of operating at the application
23 layer.

24 A. So -- so a -- a firewall which included
25 functionality that exists, that operates, that runs

1 at an application layer?

2 Q. Correct.

3 A. And so do you want -- would I have a
4 concept of -- can I put those concepts together in
5 my head?

6 Q. Yes.

7 A. Certainly I can.

8 Q. Okay. So with those concepts in your head
9 as we've just discussed them, who do you believe is
10 the first person to invent a transparent application
11 layer firewall?

12 A. I -- I do not know.

13 Q. Okay. Do you know if it was Hung Vu?

14 A. I do not know. I'm relatively certain it
15 is not.

16 Q. Why?

17 A. And I'm pausing just because -- and I think
18 we'll have this during the day. It's -- you know, I
19 want to -- I just want to carefully -- I don't want
20 to sort of inadvertently disclose privileged
21 material, so it's a little bit tricky.

22 Again, I -- I guess I've been deposed --
23 I'm being deposed as a 30(b)(6) witness and as a --
24 in my individual capacity. And certainly this
25 isn't, to my memory, the set of -- to be within the

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1 set of topics that I prepared for.

2 So -- so on these, I'll take a -- you know,
3 personal topics, I'll take a little more time. And
4 then stuff where I'm trying to understand the
5 privilege issue, I need to take a little extra time.

6 MR. COOPER: I'll step in real quick and
7 caution the witness not to reveal any
8 attorney/client-privileged information or
9 communications in response to Mr. Cukor's last
10 question.

11 THE WITNESS: So when I -- when I said that
12 I don't think that Mr. Vu -- just to be clear who
13 Mr. Vu is, I think you're referring to the named
14 inventor on the '601 patent, which is at issue in
15 this case.

16 Just from personal experience, if you had
17 asked me that question before this case began, I
18 think I would have answered in the same way. It's
19 as if you're -- you're -- these are concepts that
20 vastly predated his -- his work, as I understand his
21 work.

22 And trying to nail down a person, an
23 individual, who invented that I think would be
24 similar to nailing down the concept of who invented
25 the Internet. I think -- didn't Al Gore at some

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1 point claim to have invented the Internet? I --
2 I'm -- I'm -- I don't believe that that is in fact
3 the case.

4 MR. CUKOR: Q. So why do you believe that
5 Hung Vu did not invent the first transparent
6 application layer firewall?

7 MR. COOPER: Caution the witness not to
8 reveal any attorney/client-privileged
9 communications.

10 THE WITNESS: And at the same time, I think
11 I just answered that question.

12 MR. CUKOR: Q. It was a very long answer.
13 Is there a short version of it?

14 A. I can't identify anyone that -- I don't --
15 I believe I've indicated I -- I can't identify
16 anybody that I believe invented the transparent
17 application level firewall, as I would define it
18 personally. And I -- Mr. Vu would not be in the set
19 of that -- people that I'm unable to define.

20 Q. Fair enough.

21 I think in -- in your first answer you said
22 that the concept of transparent application layer
23 firewall vastly predated the work that was done by
24 Mr. Vu. Is that accurate?

25 A. I don't know. I mean, if we can read back

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1 my answer to -- it's hard for me to remember exactly
2 what I said. So when you ask me if I just said
3 this, I would just as soon hear the record.

4 Q. I meant is it -- is it an accurate
5 reflection of your understanding of the facts as
6 they are?

7 A. That I -- that I believe be.

8 Q. Let me ask it differently.

9 Do you believe that the concept of
10 transparent application firewall was -- vastly
11 predated the work done by Mr. Vu on the '601 patent?

12 A. The -- again, I told you I think those
13 terms are ambiguous as to what they mean. Obviously
14 for this case, we have a definition that we're
15 operating under, at least a piecemeal of those
16 terms.

17 If I go back to my background in computer
18 science, I graduated with my -- my bachelor. So
19 again, it wasn't computer science, but I had quite a
20 bit of background in the '83 time frame, and I began
21 working in 1983. I believe that, you know, the
22 concept of a -- you know, firewalls existed in
23 the -- I think '70s and '80s.

24 I think transparent network facilities of
25 one sort or another existed quite early on.

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1 Application layer code existed very early on. So --
2 and -- and numerous permutations of those --
3 those -- those concepts existed, you know, early on.

4 So I -- I don't -- again, without trying to
5 get into privileged issues, but -- but looking at
6 the -- the date on the '601 patent, if that's the
7 date you're referring -- you're referring to, I
8 personally believe that the concepts -- that those
9 concepts and the combination of those concepts
10 predated that date.

11 Q. And what is the date that you're referring
12 to?

13 A. I -- I don't have the patent in front of
14 me. I believe -- I really should know this, but
15 the -- the application date that's listed on the
16 face of the patent. But somewhere around -- what
17 was it -- October '95 perhaps.

18 Q. I'm sure the patent's been marked already.
19 I'll just give you a copy to look at so you feel
20 more comfortable.

21 MR. COOPER: Can I have a copy?

22 MR. CUKOR: Q. So I've given you a copy of
23 the '601 patent.

24 A. It was filed -- it says here it was filed
25 November 21, 1994.

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1 Q. That seem accurate to you?

2 A. Yes.

3 Q. Okay.

4 A. I think I was referring to a -- a different
5 patent when I said October '95.

6 Q. Okay. So having looked at the patent, do
7 you think that Hung Vu was the first person to
8 invent the transparent application layer firewall?

9 MR. COOPER: I'm going to caution the
10 witness not to reveal any attorney/client-privileged
11 information.

12 THE WITNESS: This -- it gets very tricky
13 in trying to differentiate. I'm trying to answer
14 based on nonprivileged information of my -- sort of
15 my background and my knowledge. I was an engineer
16 through '97, actually.

17 This patent issued in April of '97, and I
18 graduated from law school -- I was still working as
19 an engineer at the time -- in, what, May or June of
20 '97. And based on my engineering experience and the
21 date '94, and if what you're asserting is that -- I
22 mean, again, it's a very complex question.

23 You seem to be saying that this patent
24 discloses the concepts that you're talking about,
25 and '94 would be the application date. So thinking

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1 back to my engineering experience, I -- I am
2 relatively certain that if you had asked me at that
3 time, I would have been more than highly skeptical.

4 MR. CUKOR: Q. So do you think, having
5 looked at the date, that the concept of transparent
6 application firewall vastly predates the
7 November 1994 date listed on the patent?

8 MR. COOPER: I'm going to caution the
9 witness not to reveal any attorney/client-privileged
10 information.

11 THE WITNESS: Right. I think I've answered
12 the questions and sort of the line of questions that
13 you're -- that you're approaching sort of
14 repeatedly, and it's just putting me in a difficult
15 position.

16 I don't want to -- to the extent that
17 I've -- since this suit has been instituted in some
18 of the work that I've done, I really -- I believe
19 that work is privileged, and my work and my -- my
20 conclusions would be would be privileged.

21 So I'm not sure that it's -- you know, and
22 I'm not being offered up as an expert in this case,
23 so I'm not sure why you're going down this line of
24 questioning.

25 MR. CUKOR: Q. Okay. But can you answer

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1 that last question? I'm only asking it again
2 because I think you had the date in your head off by
3 a year the first time you said "vastly predated."

4 A. But I think I clarified that and said '94
5 and said that I believe it predates that. And
6 again, when we're talking about vastly, we might --
7 you know, what does "vastly" mean. So I probably
8 used that term loosely.

9 I think the concepts began for firewall,
10 for transparency and network, for application-level
11 layer code, and then various combinations and
12 permutations of that existed well before
13 November 21st, 1994.

14 Q. What are those that you can identify?

15 MR. COOPER: I'm going to object to the
16 line of questioning as calling for
17 attorney/client-privileged information and caution
18 the witness not to reveal any such information.

19 THE WITNESS: Again, this is not
20 something -- this is not a topic that I prepared for
21 today. I stopped working as an engineer in 1997.
22 That's been -- it's been a very long time.

23 To the extent that I have knowledge,
24 specific, you know, recollections about systems, I
25 believe that would have been gained in the context

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1 of this litigation.

2 MR. CUKOR: Q. So you have no personal
3 knowledge about any transparent application layer
4 firewall that predated Hung Vu's?

5 MR. COOPER: Same objection; same caution.

6 THE WITNESS: And I don't think that's what
7 I said. I think what I said is that given that was
8 a long time ago, '97 -- what is that, about 14 --
9 13, 14 years ago, have I got that right? Fifteen,
10 16. However many years that is.

11 Given that I've done a lot of privileged
12 work recently on this specific issue, it's very hard
13 for me to -- to distinguish those systems that --
14 that I was aware of and predated. I -- it's
15 essentially masked by the recent privileged work
16 that I've done, and so I'm not comfortable answering
17 that question.

18 MR. CUKOR: Q. So in the -- in the
19 invalidity contentions that Fortinet has prepared,
20 are there any pieces of prior art that disclose a
21 transparent application layer firewall that vastly
22 predate Hung Vu's invention?

23 MR. COOPER: I object to the question as
24 calling for attorney/client-privileged information
25 and instruct the witness not to answer the question

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1 to the extent it would reveal such information.

2 THE WITNESS: I think -- I think the
3 question is inappropriate. I think you're looking
4 for expert testimony from here -- from me here
5 today. I'm not -- I'm not prepared to do -- you
6 know, to offer expert testimony.

7 I think you're using vague and ambiguous
8 terms that are being thrown about in this litigation
9 and used in various contexts. So I'm -- and again,
10 since so much of my work has been -- you know, the
11 recent work on this is privileged, it's very hard
12 for me, other than in general concepts, to put --
13 you know, sort of to go back and sort of put myself
14 back in time that long ago.

15 MR. CUKOR: Q. I'm not asking for -- for
16 anything that's privileged. I'm asking for what's
17 been disclosed already to Network Protection
18 Sciences. And I'm asking what is the earliest
19 transparent application layer firewall that Fortinet
20 has disclosed to Network Protection Sciences?

21 MR. COOPER: Same objection; same
22 instruction.

23 THE WITNESS: I believe -- again, I believe
24 that you're asking material that's appropriate for
25 expert testimony. And I think that that will be --

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1 whether it's the earliest or whether it's the -- you
2 know, the most compelling, I believe we're trying to
3 winnow that list down substantially.

4 But I believe that that -- you know, that
5 that would be reserved for the expert reports which
6 are coming up, and I think it's more appropriately
7 answered in that context.

8 MR. CUKOR: Q. I'm not asking for expert
9 testimony. I'm just -- of the -- of the transparent
10 application layer firewalls that Fortinet has found,
11 which one is the earliest?

12 A. Well, I --

13 MR. COOPER: Same objection; same
14 instruction.

15 THE WITNESS: Right. I do think you're
16 asking for expert testimony. I'm not -- you know,
17 I'm not acting as an expert witness in this case.
18 I've been acting as -- as a lawyer in this case.
19 And the work's largely privileged, so I think the
20 line of questioning is inappropriate. I'm not
21 comfortable answering it.

22 MR. CUKOR: Q. Based on a privilege issue?

23 A. Yes. And based on a -- a lack of memory,
24 based on -- in trying to -- I think the privileged
25 work has essentially screened and -- the -- the -- I

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1 can't differentiate -- sort of put myself in -- back
2 in my 19- -- you know, the pre-case mind-set and go
3 through that exercise. And it would -- it would
4 take me some time. And again, I didn't prepare for
5 that -- that mental exercise before.

6 Q. Let me ask it differently.

7 Are you generally aware of the prior art
8 that has been disclosed by Fortinet to Network
9 Protection Sciences in this case?

10 MR. COOPER: I'm going to caution the
11 witness not to --

12 THE WITNESS: I have seen the -- I have
13 seen the various disclosures during the course -- on
14 the prior art during the course of this litigation.

15 MR. CUKOR: Q. And have you been
16 personally involved with the collection of that
17 prior art?

18 MR. COOPER: I object to the line of
19 questioning as calling for
20 attorney/client-privileged information. Instruct
21 the witness not to reveal any such communications in
22 his answer.

23 THE WITNESS: So was I involved with the --
24 the collection of prior art. I would say I -- I was
25 involved.

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1 MR. CUKOR: Q. Did you supervise it, at
2 least some of it?

3 MR. COOPER: Same objection; same
4 instruction.

5 THE WITNESS: I was involved. I would not
6 categor- -- characterize it as supervising.

7 MR. CUKOR: Q. Okay. So without
8 disclosing any prior art that has not been disclosed
9 to Network Protection Sciences, just the prior art
10 that was disclosed, which is the earliest piece of
11 prior art that discloses a transparent application
12 layer firewall?

13 MR. COOPER: Same objection; same
14 instruction.

15 THE WITNESS: The -- the prior art that has
16 been disclosed is voluminous. I -- again, I haven't
17 prepared for this. This would be an exercise -- I
18 would have to go through the list. I would have to
19 look at -- this would be a long -- you know, a
20 significant exercise, including under- -- you know,
21 creating a set of assumptions as to what those terms
22 mean. So I'm not -- I do not know --

23 MR. CUKOR: Q. Can't answer that?

24 A. -- the answer to that right now.

25 Q. Okay. Does Fortinet sell products that

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1 include transparent application layer firewalls?

2 MR. COOPER: Same objection; same
3 instruction.

4 THE WITNESS: Again, this is not part --
5 this was not part of the materials that I prepared
6 for the 30(b)(6) part of this case, and I think what
7 you're asking for -- actually, I'm not sure what
8 you're asking for.

9 You seem to be asking -- actually -- I'm
10 wearing a number of hats here, so it -- it's a
11 little bit cumbersome to -- to answer that. But I
12 don't understand what you mean by those terms. I
13 think they're ambiguous. And when you group them
14 all together, there is a certain meaning.

15 And I think that you're asking for a set of
16 legal conclusions that will -- and legal reason- --
17 supporting legal reasoning that will come out in
18 expert reports.

19 MR. CUKOR: Q. Can you answer the
20 question?

21 A. I just did answer the question.

22 Q. Does Fortinet sell transparent application
23 layer firewalls?

24 MR. COOPER: Same objection; same
25 instructions.

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1 THE WITNESS: I can say that Fortinet sells
2 firewalls. I can say that Fortinet's firewalls
3 include code that operates at the application layer.
4 Again, I haven't written any of the code, and I'm
5 not a developer at Fortinet. But I think that those
6 are relatively obvious conclusions.

7 And I forget; the other terms that you were
8 grouping together were ...

9 MR. CUKOR: Transparency.

10 THE WITNESS: Transparency. And that is
11 a -- I believe that's sort of an overused term as
12 to -- as far as what that means and what context.
13 So what does it mean?

14 Are -- are you saying is the entire
15 firewall completely transparent in -- in -- you
16 know, I'm not sure what you mean by that.

17 MR. CUKOR: Q. You mentioned that Fortinet
18 sells firewalls that operate at the application
19 layer, correct?

20 A. No. I said that Fortinet sells firewalls,
21 and then I said that the firewalls had code that ran
22 at an application layer.

23 Q. Okay. And do those firewalls also have the
24 capacity to operate in a transparent mode?

25 MR. COOPER: Same objection; same

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1 instruction.

2 THE WITNESS: I know that there is a mode
3 that when you first -- actually, I'm not a user
4 of -- of -- of -- of FortiGate, and so I'm going
5 to -- anecdotally, I believe there is a -- some sort
6 of a transparent mode, I think, where the firewall
7 sort of is sort of off-line, is kind of completely
8 transparent, is sort of doing nothing.

9 But again, I'm not an operator. I've never
10 used this feature. It's just sort of anecdotally in
11 my existence at Fortinet. I -- you know, I've heard
12 this; I've heard that. Again, I've never used a
13 FortiGate firewall. I've never operated the
14 interface. I've never set one up. And I haven't
15 designed any of the code that runs on the -- any of
16 our firewalls or any of our products.

17 MR. CUKOR: Q. Do you have a computer in
18 your office?

19 A. Right now, I don't.

20 Q. Because you have a laptop?

21 A. And it's with -- I think it might be --
22 yeah, it's -- yeah, it's not in my office right now.

23 Q. When you're in your office, do you have
24 access to the Internet?

25 A. Yes.

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1 Q. And do you in fact go on the Internet
2 sometimes?

3 A. Yes.

4 Q. Do you go on Facebook ever?

5 A. Yes.

6 Q. And you do that from work?

7 A. I have.

8 Q. And when you do that, do you go through a
9 FortiGate firewall?

10 A. I don't know the configuration of our -- of
11 our network, frankly.

12 Q. Do you think your network is protected by a
13 FortiGate firewall?

14 A. I would -- given who Fortinet is and the
15 fact that Fortinet sells firewalls, I would
16 speculate that, indeed, we likely deploy our own
17 devices.

18 Q. And is it possible the reason you don't
19 know for sure is because the firewall is transparent
20 to you as a user?

21 MR. COOPER: I'm going to object to the
22 question as calling for attorney/client-privileged
23 communications and instruct the witness not to
24 answer to the extent it would reveal such
25 communications.

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1 MR. CUKOR: Before you answer ...

2 I think that your repeated instructions are
3 inappropriate and in violation of the Court's rules.
4 I'm going to let you continue to do that, but you
5 act as you see fit and at your own peril.

6 MR. COOPER: Duly noted.

7 THE WITNESS: So -- so again, I told you
8 I'm speculating. I do see various icons and things
9 that show up. I know my system is running
10 FortiClient, which is a Fortinet product. So I do
11 see FortiClient. I don't know about, and I don't
12 inquire into, the underlying network topology.

13 MR. CUKOR: Q. Before, you testified you
14 never used a FortiGate product, right?

15 A. Yes.

16 Q. But you do think you have traversed a
17 FortiGate product while you used the Internet at
18 work, right?

19 A. I was speculating. I don't know. I don't
20 know the configuration.

21 Q. But you believe so?

22 A. I don't have a belief one way or the other.

23 Q. Really?

24 A. Correct.

25 Q. Do you think it's -- it's possible that the

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1 network that you use at work is not protected by a
2 FortiGate firewall?

3 A. I -- I told you, I don't know anything
4 about the configuration of our network. I -- for
5 a -- my wife comments frequently about what -- how
6 incredibly non-techie I am for a person that has
7 studied computer science as much as I have. I
8 don't -- I -- you know, I can barely operate my
9 phone. I'm not a techie person.

10 Q. This is not really a techie question. This
11 is more of a policy question.

12 Do you think it would be Fortinet's policy
13 to have their internal network not protected by a
14 FortiGate product?

15 A. I don't know. I'm -- that's not --
16 that's the MIS department. Again, it's not a topic
17 I prepared for today, is what our topology looks
18 like and, you know, the operations of our -- of our
19 network.

20 Q. Have you reviewed the '601 patent?

21 MR. COOPER: Same objection; same
22 instruction.

23 THE WITNESS: I have read the '601 patent.

24 MR. CUKOR: Q. How many times?

25 MR. COOPER: Same objection; same

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1 instruction.

2 THE WITNESS: I -- I can't say how many
3 times.

4 MR. CUKOR: Q. Approximately.

5 A. I would be just guessing.

6 Q. Approximately how much time have you spent
7 looking at the '601 patent?

8 MR. COOPER: Same objection; same
9 instruction.

10 THE WITNESS: The -- this case has been
11 going on for about three years maybe. I would just
12 hes- -- I don't know. I would hesitate to guess
13 obviously because this is the asserted patent.
14 There would be a substantial amount of time
15 aggregated over that -- the pendency of the cases.

16 MR. CUKOR: Q. When we were talking before
17 about Fortinet products that are firewalls that have
18 the capacity of operating at the application layer
19 and also have the capacity of operating in a
20 transparent mode, which products specifically were
21 you referring to?

22 MR. COOPER: Same objection; same
23 instruction.

24 THE WITNESS: No specific products. You
25 simply asked if Fortinet -- I mean, I had said they

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1 sold -- we definitely have products that would be
2 considered firewalls. And we definitely have
3 products that include application layer code.

4 MR. CUKOR: Q. Which products are those?

5 A. Okay. You would have to get into the
6 definition of what -- what is a firewall. And --
7 and again, it gets a little bit complicated. And
8 I'm sure various people would -- would offer
9 different definitions for what that is.

10 But I -- I believe that our FortiGate
11 family of products would be considered a firewall.

12 Q. And do all of the FortiGate family of
13 products have code that allow it to operate at the
14 application layer?

15 MR. COOPER: Same objection; same
16 instruction.

17 THE WITNESS: Again, I said I'm not a
18 developer. I've never run it. But anecdotally and
19 just from my experience as an engineer, I would
20 anticipate that there is code running on the
21 FortiGate family of appliances that would run at an
22 application layer.

23 MR. CUKOR: Q. Does Fortinet sell any
24 firewall that does not operate -- or is not capable
25 of operating at the application layer?

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1 A. I don't know. Again, I -- I -- I couldn't
2 even -- we have a large list of products, and I
3 can't even name them. I haven't worked on any of
4 them.

5 Q. Does Fortinet sell any routers?

6 A. It -- it depends on what you mean by a
7 "router." It depends on what you mean by a
8 "router."

9 Q. Does Fortinet sell any hardware that is
10 able to route packets but does not have firewall
11 capacity?

12 A. Are you speaking about current products or
13 historical products?

14 Q. If there's a distinction, you can make it.

15 A. Because I don't know the full list of
16 current products. I prepared for the 30(b)(6)
17 topics on -- which distinctly called out for the
18 accused products, so I sort of focused my
19 investigation on those topics and those products.

20 Again, I'm -- the term "firewall" is
21 relatively undefined and fairly loosely used, but I
22 believe there was a FortiSwitch product at least at
23 some point historically. I don't know if that would
24 be considered to have firewall capabilities.

25 Q. What was the FortiSwitch product; do you

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1 remember?

2 A. I've never operated it, but my
3 understanding, it was -- it operated as a switch.
4 And I -- I sort of get that from the naming
5 convention.

6 Q. Do you know if it could perform packet
7 filtering?

8 A. I -- no. Forti- -- you've exhausted my
9 information. FortiSwitch is the name, and I believe
10 it was a switching product. That's the extent of my
11 knowledge about that product.

12 Q. Okay. Have you ever taken a patent license
13 from a third party on a Fortinet product that
14 included a transparent application layer firewall?

15 MR. COOPER: I object to this question as
16 calling for attorney/client-privileged
17 communications and instruct the witness not to
18 answer it to the extent it would reveal such
19 communications.

20 MR. CUKOR: I want you to read my question
21 back on your screen that you have in front of you
22 and see if you maintain your objection.

23 MR. COOPER: I maintain my objection.

24 MR. CUKOR: Q. Are you following your
25 attorney's direction?

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1 MR. COOPER: I did not instruct the witness
2 not to answer the question. I instructed the
3 witness not to answer the question to the extent it
4 would reveal attorney/client-privileged
5 communications. That's all I've done so far today.

6 THE WITNESS: So I believe the question was
7 whether Fortinet had taken a license -- actually, it
8 was a fairly compound question. So could you break
9 it down for me just a little bit.

10 MR. CUKOR: Ms. Moose, would you read back
11 the question.

12 And if you need further clarification, I
13 will give it to you.

14 (Record read as follows:

15 QUESTION: Have you ever taken a patent
16 license from a third party on a Fortinet
17 product that included a transparent
18 application layer firewall?)

19 THE WITNESS: So -- so that's assuming I
20 have -- the question assumes that I -- I know
21 what -- or we know what a transparent application
22 layer firewall is, which I've told you I -- I don't
23 understand the -- you know, I -- I -- I believe that
24 that term would be ambiguous and it would be
25 construed differently by different people.

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1 So if I answer the question, you know, has
2 Fortinet taking -- taken a patent license, we have
3 taken -- we have a select set of patent licenses
4 that have come out of litigation. But I -- but I --
5 but I don't think that any specific product was
6 licensed. I would have to sort of think about that
7 and review that, by license.

8 MR. CUKOR: Q. So the licenses that
9 Fortinet has taken are not by product, they're just
10 by -- they're for all products?

11 MR. COOPER: Same objection; same
12 instruction.

13 THE WITNESS: I believe that patent
14 licenses that we've entered into have been only in
15 connection with litigation. And I -- and I don't
16 believe they are specific to products. I would have
17 to review the licenses to be certain.

18 MR. CUKOR: Q. So Fortinet has never taken
19 a patent license from a third party when it wasn't
20 sued first?

21 MR. COOPER: Same instruction.

22 THE WITNESS: This is within the 30(b)(6)
23 topics, and I did diligently prepare. I did review
24 a list of the patent licenses that we provided to
25 NPS.

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1 Can I -- can you repeat the question back
2 for me again. I'm trying to remember through --
3 answer the question, sort of wading in my mind
4 through all of the, you know, different licenses
5 that we've gone through and the different
6 litigations and the different contexts, so it's ...

7 (Record read as follows:

8 QUESTION: So Fortinet has never taken
9 a patent license from a third party when it
10 wasn't sued first?)

11 THE WITNESS: I believe that may be
12 correct.

13 MR. CUKOR: Q. How come?

14 A. How come what?

15 Q. How come Fortinet has never taken a license
16 from a third party without being sued first?

17 MR. COOPER: Same objection; same
18 instruction.

19 THE WITNESS: I -- I don't think the
20 occasion has arisen where the business case was made
21 that a -- a license was desirable, from a -- from a
22 business perspective.

23 MR. CUKOR: Q. What do you mean by
24 "business case"?

25 A. When you say "take a license," I think

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1 you're referring -- that would be like a purchase.
2 It's a business decision to enter into a license.
3 And I -- you say why haven't we, and I suspect the
4 reason is there hasn't been a -- a business case
5 that -- that -- that compelled that result.

6 Q. When you are evaluating the business case
7 for taking a license, do you compare the cost of
8 litigation versus the cost of a license?

9 MR. COOPER: Same objection; same
10 instruction.

11 THE WITNESS: I think that you're assuming
12 that -- you're assuming that -- let me think.

13 I'm sorry; I'm just not that smart, I
14 guess. The -- trying to think.

15 So the question was -- can I have that read
16 back again. I'm sorry.

17 MR. CUKOR: Ms. Moose, please.

18 (Record read as follows:

19 QUESTION: When you are evaluating the
20 business case for taking a license, do you
21 compare the cost of litigation versus the
22 cost of a license?)

23 THE WITNESS: So when I compare the
24 business case for taking license -- you're saying
25 in -- in general? Is that the question?

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1 MR. CUKOR: Yes.

2 THE WITNESS: You -- so you appear to be
3 assuming that patent license proposals, business
4 proposals, license proposals have been made to
5 Fortinet, and you're asking about our process in
6 evaluating whether to take a license or not, and
7 then you're further adding the question as to
8 whether, in that scenario, we would compare the cost
9 of litigation to the proposed cost of the license?

10 MR. CUKOR: I realize that you are a very
11 smart man and that you are capable of thinking a lot
12 of ways down the road on my questions. But I think
13 this is a more simple question --

14 THE WITNESS: I think all those aspects
15 were in there.

16 MR. CUKOR: -- than you've made -- let me
17 ask it again and see if you can just answer this
18 question:

19 Q. You mentioned before that no business case
20 has been made for taking a license outside of
21 litigation. And that is, I believe, accurate
22 testimony, right?

23 A. I don't -- I don't think that's accurate.
24 You asked me why haven't we taken a license. And
25 that's sort of why -- the absence of a -- of an

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1 event, why hasn't an event occurred. And I'm saying
2 it just hasn't, you know.

3 And so I was speculating that the reason
4 that would cause that event to occur hasn't
5 occurred. So I'm not -- I wasn't referring to any
6 specific -- you know, you seem to assume that there
7 are specific instances and decisions and stuff. And
8 I'm just saying it hasn't occurred, that I'm aware
9 of.

10 Again, I'd like to review the -- you know,
11 to be completely accurate, I'd like to review the
12 licenses. But I believe each one was a -- was --
13 was -- was initiated by a lawsuit.

14 Q. Well, let me ask you in this case. In the
15 NPS case, when Fortinet was first sued by NPS and
16 since then, Fortinet has made a decision not to take
17 a license on the patent in suit from NPS, correct?

18 MR. COOPER: I'm going to object to that
19 question as calling for attorney/client-privileged
20 information and instruct the witness not to answer
21 it to the extent it would reveal such
22 communications.

23 THE WITNESS: And it seems to me you're
24 asking for communications that would have been had
25 during -- during settlement discussions, so I'm not

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1 sure that that makes sense. I don't think that --
2 as I -- as I think back, I don't believe that NPS
3 reached out to Fortinet and offered a license. I
4 believe NPS simply sued Fortinet.

5 MR. CUKOR: Q. Well, let me -- let me ask
6 it differently.

7 Fortinet has not taken a license under the
8 '601 patent, correct?

9 A. We do not have a license, that I'm aware
10 of, to the '601 patent.

11 Q. And in making the decision not to take a
12 license under the '601 patent, did Fortinet evaluate
13 the cost of the license versus the cost of the
14 litigation?

15 MR. COOPER: Same objection; same
16 instruction.

17 THE WITNESS: Again, I would say NPS sued
18 us. They did not offer a license. And to the
19 extent that you're asking about our thought process
20 during the course of the litigation, I think it's
21 inappropriate.

22 I also think that the -- you're asking
23 about our thought process during settlement
24 negotiations and what went into the -- sort of our
25 thinking during the settlement negotiations. I

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1 don't think that that's appropriate.

2 MR. CUKOR: It's okay. That's my question.

3 If you refuse to answer, that's okay. I think it's

4 an appropriate question. I don't think I'm getting

5 at a privileged communication. But if you feel

6 differently, you have counsel here, and he can

7 direct you. And you're an attorney.

8 (Cell phone interruption.)

9 THE VIDEOGRAPHER: I'm sorry.

10 MR. CUKOR: So let me ask the question

11 again. And if you feel it's objectionable, you can

12 object or your counsel can object or you both can

13 object.

14 Q. In the course of determining whether

15 Fortinet would take a license from NPS under the

16 '601 patent, has Fortinet evaluated the cost of the

17 license versus the cost of the litigation?

18 MR. COOPER: Same objection; same

19 instruction.

20 THE WITNESS: Again, I think you're asking

21 for the internal thought processes during the course

22 of litigation. I would -- I would -- and I don't

23 think that's appropriate.

24 I obviously -- I believe I can answer the

25 question as to in the general case, during the

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1 course of a litigation, is cost of defense
2 considered when determining whether to resolve a
3 litigation or not. I believe that would be a
4 reasonable practice, you know, a reasonable
5 consideration to -- factor to include in a
6 consideration.

7 MR. CUKOR: Q. And is exposure similarly a
8 reasonable factor to consider?

9 A. So generically speaking, exposure. I'm not
10 sure exactly what you mean by -- by "exposure." I
11 mean, it's --

12 Q. Potential loss in a lawsuit if a jury finds
13 against you; if a jury finds that the patent that's
14 being asserted is valid and infringed by Fortinet.

15 A. Speaking in the abstract and assuming a
16 patent that -- a patent had the hallmarks of
17 validity and had -- and -- and there was a -- a
18 compelling infringement case, exposure would appear
19 to be a reasonable factor to include in that
20 consideration.

21 MR. COOPER: Sorry to interject.

22 Holly, could you tell us how long we've
23 been on the record, please.

24 THE REPORTER: Do you have an easier way to
25 do that?

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1 THE VIDEOGRAPHER: One hour even.

2 THE REPORTER: One hour.

3 MR. COOPER: Thank you.

4 MR. CUKOR: Q. If a jury finds that the
5 '601 patent is valid and infringed by Fortinet, is
6 Network Protection Sciences entitled to a reasonable
7 royalty?

8 MR. COOPER: Same objection; same
9 instruction.

10 THE WITNESS: I'm -- you're straying off
11 topics that -- that I prepared for and asking for --
12 for legal conclusions that seem, you know,
13 inappropriate in this context.

14 I'm sorry, I just -- I'm struggling with
15 the line of questioning. It's not what I sort of
16 had prepared for specifically and that I thought I
17 was coming to testify about.

18 Actually, it's been an hour, and it would
19 be -- I could use a bathroom break, please.

20 MR. CUKOR: Could you answer the question
21 and then we'll take a break.

22 THE WITNESS: Oh, I thought I did. I
23 thought I did. What was -- what was the pending
24 question? Sorry.

25 MR. CUKOR: Ms. Moose.

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1 (Record read as follows:

2 QUESTION: If a jury finds that the
3 '601 patent is valid and infringed by
4 Fortinet, is Network Protection Sciences
5 entitled to a reasonable royalty?)

6 THE WITNESS: Oh, okay. I think I answered
7 in a nonanswer way. I think you're asking for legal
8 conclusions and that -- I don't -- that I think are
9 inappropriate line of questioning for -- for me.

10 MR. CUKOR: Q. Can you just do the best
11 you can to answer. If you don't know, you can say,
12 "I don't know."

13 A. I'm not comfortable answering the question.
14 I'm having difficulty with the line of questioning,
15 parsing between -- it seems like you're spending the
16 bulk of your time trying to either make up the
17 substantive case from an engineering perspective,
18 when I am not an engineer and haven't worked on the
19 products, or trying to figure out sort of the -- the
20 legal thinking and the going on behind the scenes
21 during -- during the course of our defense, which I
22 believe would be privileged. So I'm struggling with
23 this.

24 I'm not trying to be disingenuous. I'm
25 just -- I thought there were a set of topics, and I

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1 think we've had exactly one question so far that's
2 been directed to one of the topics I prepared for.

3 Q. Let me maybe --

4 A. I would like to take a break if I could.
5 So I think the answer to that is, no, I think that
6 question is inappropriate.

7 Q. So you are -- you don't know or you're
8 refusing to answer?

9 A. I don't -- I'm unable to extract from my
10 set of opinions and legal opinions, particularly
11 regarding this case, nonprivileged communication
12 that I'm willing to offer, that I'm able to offer
13 up.

14 Q. So you're taking the privilege?

15 A. Yes.

16 MR. CUKOR: Okay. Sure. Let's take a
17 break.

18 THE VIDEOGRAPHER: Off the record. The
19 time is 11:09 a.m.

20 (Recess taken.)

21 THE VIDEOGRAPHER: We are back on the
22 record. The time is 11:21 a.m.

23 MR. CUKOR: Q. Is it the case that
24 Fortinet employees have invented all of the
25 technology that's used in the FortiGate products?

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1 A. No.

2 Q. Is it the case that there are patents
3 invented by people that are not Fortinet employees
4 that are still in force today that cover the
5 FortiGate products?

6 MR. COOPER: Caution the witness not to
7 reveal any attorney/client-privileged
8 communications.

9 THE WITNESS: So you're asking if there are
10 patents that exist that are valid and enforceable
11 and being enforced today that cover Fortinet
12 products?

13 MR. CUKOR: No. Let me ask it again.

14 THE WITNESS: Oh, okay.

15 MR. CUKOR: Q. Are there patents that
16 are -- exist that are valid that cover the Fortinet
17 products?

18 MR. COOPER: Same caution.

19 THE WITNESS: That's -- so you did change
20 the question. So you're saying internal or external
21 patents by people inside of Fortinet or outside, any
22 patent in existence?

23 MR. CUKOR: No, you're right. Let me ask
24 it again. Thank you.

25 Q. I'm asking are there any live patents that

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1 are not assigned to Fortinet that cover the
2 FortiGate products?

3 MR. COOPER: Object to the question as
4 calling for attorney/client-privileged
5 communications. Instruct the witness not to answer
6 to the extent it would reveal such communications.

7 THE WITNESS: To the extent that I would
8 know -- you know, the entirety of the basis for my
9 answer to that question would be all based on
10 privileged communications. So I don't think I can
11 answer that question.

12 MR. CUKOR: Q. Well, some patents are
13 licensed for the Fortinet products, right?

14 A. I don't believe that's the case.

15 Q. None of the licenses produced in this
16 litigation cover the FortiGate products?

17 A. I believe that's correct.

18 Q. Okay. So to the best of your knowledge,
19 the FortiGate products are not licensed under any
20 third party's patents?

21 A. We have taken licenses in a number of
22 discrete situations where there has been litigation.
23 I'm not aware of any case -- any situation -- let's
24 say. And again, the time frame is a little unclear
25 'cause patents have changed over time -- patents

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1 that we've licensed have changed over time and, I
2 believe, have -- have expired as well.

3 But I don't think there was any -- you
4 know, I think each of the licenses that we've taken
5 has been in settlement of a litigation, without an
6 admission of validity or infringement.

7 Q. But the license still covers FortiGate
8 products, right?

9 MR. COOPER: Same objection; same
10 instruction.

11 THE WITNESS: So when you say "covers
12 FortiGate products," I think we should -- I mean, we
13 should look at the licenses covers, as in regardless
14 of whether the patents, you know, read on the
15 products. If they did and if they were valid, would
16 the Fortinet products be licensed. And I -- that
17 would be the case.

18 MR. CUKOR: Q. I understand the
19 distinction that you're making now.

20 So some Fortinet -- FortiGate products may
21 be licensed, but you are saying that as far as you
22 know, no FortiGate products require a license from
23 any third party?

24 A. Not that I'm aware of.

25 Q. Okay. So was my statement accurate?

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1 A. Which statement?

2 Q. Let me ask it again.

3 As far as you are aware of -- let me start
4 again.

5 As far as you know, no FortiGate products
6 require a patent license from any third party?

7 A. Again, the entire -- the basis -- you've
8 now asked a much, much broader question, which would
9 encompass -- to the extent that I've looked into
10 that issue, the entirety of my knowledge base on
11 that issue would be -- would be privileged
12 communications, and -- and so I don't think that's
13 an appropriate question. I think it calls for a --
14 an answer based on privilege.

15 Q. Do the FortiGate products require a license
16 under the '601 patent?

17 MR. COOPER: Same objection.

18 THE WITNESS: This is --

19 MR. COOPER: Same instruction.

20 THE WITNESS: Again, this is -- my
21 knowledge of the '601 patent began with this
22 litigation. And the entirety of my knowledge base
23 about this patent all is in the con- -- is all
24 privileged and in the context of -- of defending
25 this litigation. So I don't think there's a

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1 nonprivileged answer to that question.

2 MR. CUKOR: Fair enough.

3 Q. Does Fortinet do any -- start again.

4 Does Fortinet make any attempts to
5 determine if its own products are covered by any
6 third-party patents before it launches those
7 products?

8 MR. COOPER: Same objection; same
9 instruction.

10 THE WITNESS: The -- I'm struggling with
11 the privilege issue on that. But I think the
12 general question you're just asking is do we do a --
13 for each new feature that we add or each new product
14 that we add, do we do a patent search -- do we do a
15 patent search in advance of -- of developing a
16 feature.

17 MR. CUKOR: You can answer that question.
18 My question was broader.

19 THE WITNESS: The -- the answer -- that's
20 the way I interpreted the question. And the answer
21 to that is no, not to my knowledge.

22 MR. CUKOR: Q. Does Fortinet do any
23 clearance work to determine if any third-party
24 patent licenses are required before launching any
25 product?

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1 MR. COOPER: Same objection; same
2 instruction.

3 THE WITNESS: I think on the broader
4 question, my -- my knowledge base, again, would be
5 completely -- would be based on my interactions with
6 outside counsel in designing our -- you know, doing
7 risk -- risk analysis. And I think that the -- the
8 basis for the question would be privileged.

9 MR. CUKOR: So I'll tell you on the record
10 that I think that at trial, I would like to assert
11 that Fortinet does no clearance work at all before
12 launching any new products. And if you have any
13 testimony to the contrary, I'd like you to give that
14 to me now. If you're telling me it's privileged,
15 then that's your choice.

16 MR. COOPER: Same objection; same
17 instruction.

18 THE WITNESS: I'll stand by my prior
19 answer.

20 MR. CUKOR: Okay.

21 Q. Before the break, we were talking about a
22 reasonable royalty. And I think that I asked the
23 question in a way that -- that you thought I was
24 getting at something other than what I was trying to
25 get at.

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1 What I want to know is, is there anything
2 particular to the plaintiff in this case that would
3 not entitle them to a reasonable royalty if they
4 held a patent that was valid and infringed?

5 MR. COOPER: Same objection; same
6 instruction.

7 THE WITNESS: And during the break, I did
8 use the rest room, and I did have a moment to
9 reflect about the privilege issues which I've been
10 struggling with 'cause I do want to be forthcoming.
11 And certainly I diligently prepared on the 30(b)(6)
12 topics that I thought would be the focus of this
13 deposition.

14 I think that when you're asking about that
15 question, you're asking -- the entirety of the basis
16 of any knowledge I would have would be based on
17 privileged communication and privileged work during
18 the pendency of this case. And so I think the
19 question is -- is inappropriate.

20 I think it's counter to the judge's
21 standing orders in this -- in this case, and I think
22 it seeks a legal conclusion; it seeks sort of the
23 strategic considerations and the legal thinking
24 behind our defensive actions.

25 And I -- to the extent there is an answer,

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1 I believe it's privileged, and I don't think I need
2 to answer those.

3 MR. CUKOR: Q. Okay. So I'm asking you in
4 your personal capacity, do you think that the fact
5 that NPS is a nonpracticing entity makes a
6 difference in terms of the damages they're entitled
7 to receive in a patent litigation?

8 MR. COOPER: Same objection; same
9 instruction.

10 THE WITNESS: I have no knowledge of NPS or
11 this patent in my personal capacity. It's all been
12 in my professional capacity in defending this
13 litigation.

14 MR. CUKOR: Q. Okay. So generally, not
15 with regard to NPS, in your personal capacity, do
16 you believe that a nonpracticing entity that owns a
17 patent is entitled to the -- a diminished damages
18 award if it's found to be valid and infringed?

19 A. So you're asking if I have an opinion about
20 nonpracticing entities and whether damage -- damages
21 should be adjusted based on the fact that they're a
22 not practicing entity?

23 Q. Yes.

24 A. I -- I -- I don't have an opinion on that.

25 Q. Okay. Do you know who Steve Bellovin is?

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1 A. Yes.

2 Q. Who is he?

3 A. I believe he is the expert that NPS
4 retained in this case, or an expert that NPS
5 retained in this case.

6 Q. Why do you believe that he's been retained
7 by NPS?

8 MR. COOPER: Same objection; same
9 instruction.

10 THE WITNESS: I've seen an expert report
11 that he provided in connection with this case.

12 MR. CUKOR: Q. Had you heard his name
13 before?

14 A. Before this case?

15 Q. Mm-hm.

16 A. Yes.

17 Q. In what context?

18 A. A litigation context.

19 Q. What context was that? Which litigation?

20 A. The -- the Trend Micro litigation.

21 Q. And was Professor Bellovin an expert in
22 that case?

23 A. No. And I don't know that he's a
24 professor. I don't know his background.

25 Q. Okay.

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1 A. I don't -- I'm not saying that's not true.

2 I just -- you make assumptions into questions that

3 I -- I don't know the -- that I don't know.

4 Q. I think it's legitimate for you to point
5 that out. That's fine.

6 So what role did Steven Bellovin play in
7 the Trend Micro case?

8 A. None.

9 Q. So how did he -- how did his name come to
10 your attention?

11 MR. COOPER: Caution the witness not to
12 reveal any attorney/client-privileged information.

13 THE WITNESS: In the Trend litigation, a --
14 a book drafted by -- was -- there was a book
15 draft- -- that was written by Cheswick and Bellovin,
16 "Repelling the Wily Hacker," I believe, something
17 like that. Something with "Repelling the Wily
18 Hacker." And I -- I saw that reference.

19 MR. CUKOR: Q. Was it in connection with
20 prior art?

21 A. Yes.

22 Q. And was it in connection with prior art
23 that Fortinet used in that litigation?

24 MR. COOPER: Same caution.

25 THE WITNESS: I believe that prior art,

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1 that book, was relevant in that litigation.

2 MR. CUKOR: Q. Do you know anything else
3 about Steven Bellovin, besides authoring that book?

4 A. I -- I saw the expert report he presumably
5 drafted in this case.

6 Q. Do you know anything else?

7 MR. COOPER: Same objection; same
8 instruction.

9 THE WITNESS: Nothing that -- that wouldn't
10 be a privilege -- that I wouldn't have received in
11 the context of a privileged communication.

12 MR. CUKOR: Q. So you weren't aware of him
13 in your personal capacity before the Trend Micro
14 litigation?

15 A. No, I was not.

16 Q. Okay. And do you know Bill Cheswick?

17 A. Yes.

18 Q. Have you met him?

19 A. Yes.

20 Q. In what context?

21 A. In the context of this litigation.

22 Q. When did you meet him?

23 MR. COOPER: Same objection; same
24 instruction.

25 THE WITNESS: It was a number of months

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1 ago.

2 MR. CUKOR: Q. How many times did you meet
3 with him?

4 MR. COOPER: Same objection; same
5 instruction.

6 THE WITNESS: I believe once.

7 MR. CUKOR: Q. Who else was present?

8 MR. COOPER: Same instruction.

9 THE WITNESS: I believe two Quinn Emanuel
10 attorneys.

11 MR. CUKOR: Q. Where was this meeting?

12 MR. COOPER: Same instruction --

13 THE WITNESS: I --

14 MR. COOPER: Same --

15 THE WITNESS: In his offices.

16 Sorry.

17 MR. COOPER: It's okay.

18 MR. CUKOR: Q. In these offices?

19 A. Yes.

20 Q. In Quinn Emanuel's offices?

21 A. Yes.

22 Q. Has Fortinet retained Bill Cheswick?

23 MR. COOPER: Same instruction.

24 THE WITNESS: I believe so.

25 MR. CUKOR: Q. In his capacity as a fact

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1 witness or an expert witness?

2 A. I'm not a hundred percent sure, but I
3 believe as an expert witness.

4 Q. Did you review the deposition of Steven
5 Bellovin?

6 MR. COOPER: Same objection; same
7 instruction.

8 THE WITNESS: No.

9 MR. CUKOR: Q. Has Fortinet ever purchased
10 any patents?

11 A. Yes.

12 Q. Have any of those purchases been outside
13 the context a litigation?

14 A. Yes.

15 Q. Has Fortinet ever litigated any of the
16 patents it's purchased?

17 A. And when you say "patents," do you mean
18 issued patents?

19 Q. Has Fortinet litigated any of the
20 intellectual property that it has purchased from a
21 third party?

22 A. Yes.

23 Q. In what context?

24 A. There were -- there was a suit against a
25 competitor, Palo Alto Networks, which included a

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1 number of claims. But I believe it included patents
2 that were not purchased but resulted from
3 applications that had been purchased -- you know,
4 parent applications, at least applications -- or
5 related to applications that had been purchased
6 earlier.

7 Q. Who were those applications purchased from?

8 A. CoSine Communications.

9 Q. Are they a company that's still in
10 business?

11 A. I'm not sure.

12 Q. Were they a firewall competitor?

13 A. No.

14 Q. Did Fortinet buy those patent applications
15 from CoSine Communications for the specific purpose
16 of litigating them against Palo Alto Networks?

17 MR. COOPER: Same objection; same
18 instruction.

19 THE WITNESS: No.

20 MR. CUKOR: Q. Why did Fortinet purchase
21 those patent applications from CoSine
22 Communications?

23 MR. COOPER: Same objection; same
24 instruction.

25 THE WITNESS: It was a -- a -- there was a

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1 compelling business case based on price and
2 valuation such that it made sense.

3 MR. CUKOR: Q. What was the compelling
4 business case?

5 MR. COOPER: Same instruction.

6 THE WITNESS: The -- it -- it was -- it was
7 worth doing. I mean, it was a -- why do you make
8 any business decision? The price was -- was, you
9 know, reasonable relative to the perceived value.

10 MR. CUKOR: Q. How did Fortinet expect to
11 actualize the perceived value?

12 MR. COOPER: Same instruction.

13 THE WITNESS: Is the question at the time
14 of the purchase?

15 MR. CUKOR: Correct.

16 THE WITNESS: And the question is how did
17 Fortinet expect to actualize the perceived value?

18 How did we expect to actualize ... I think
19 you're asking what was the perceived value.

20 MR. CUKOR: (Nonverbal response.)

21 THE WITNESS: No? What does "actualized"
22 mean, then? I mean, the -- a decision was made to
23 purchase them because there was perceived value. So
24 do you want to know what that perceived value is?
25 And if not, if there's -- if "actualized" means

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1 something different, I'd love -- an explanation
2 would be helpful.

3 MR. CUKOR: Q. What was the return on
4 investment that Fortinet expected for purchasing the
5 patent applications from CoSine Communications?

6 MR. COOPER: Same instruction.

7 THE WITNESS: There was no specific return
8 on investment. The -- the patents -- they're just
9 simply holding the patents.

10 MR. CUKOR: Q. So how is that a compelling
11 business case?

12 A. It's a -- Fortinet generally holds its
13 patents -- again, I struggle with the privilege
14 issue, but the -- generally holds its patents
15 defensively. So there is a perceived value from a
16 defensive standpoint.

17 Q. When you say "defensive," do you mean
18 potentially for litigation?

19 MR. COOPER: Same objection; same
20 instruction.

21 THE WITNESS: It -- that -- that would be a
22 portion of it. But again, these were just
23 applications at the time. I think the larger value
24 is just Fortinet was a private company and was
25 building assets to build the overall value of the

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1 business.

2 MR. CUKOR: Q. So the patent applications
3 that Fortinet purchased from CoSine Communications
4 were for inventions that were not invented by
5 Fortinet, correct?

6 MR. COOPER: Same objection; same
7 instruction.

8 THE WITNESS: The patent applications that
9 were purchased were filed by CoSine Communications,
10 and the named inventors were, I believe, CoSine
11 Communications employees or contractors.

12 MR. CUKOR: Q. And Fortinet subsequently
13 sued Palo Alto Networks on patents that came about
14 as a result of those patent applications, correct?

15 A. The -- the suit is in a -- I believe that
16 it's all a public filing. There were a number of
17 allegations and competitive issues that were
18 asserted between the two companies.

19 Q. Did Fortinet allege in its litigation with
20 Palo Alto Networks that Palo Alto Networks infringed
21 the patents that arose out of the patent
22 applications that were purchased by Fortinet from
23 CoSine Communications?

24 A. I believe there were allegations in there.
25 Again, I don't have that -- that wasn't part of my

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1 prep for today, is to review the -- the -- the prior
2 litigation.

3 But in addition to the trade secrets and
4 the misappropriation and the various other unfair
5 comp claims that were asserted against Palo Alto
6 Networks, there were patents, and I believe those
7 included patents that would have, at least in part,
8 you know, had -- had parentage back -- I believe it
9 was a number of years later, so they would have
10 stemmed from that -- that small kernel of
11 applications that came from CoSine.

12 Q. Was there anything unethical about that?

13 A. Unethical about what?

14 Q. About suing Palo Alto Networks on patents
15 that weren't invented by Fortinet.

16 A. I'm -- I'm not sure what you mean by that.

17 Q. Was there anything unethical about it?

18 A. Are you asking if there -- if we -- if
19 anything in the Palo Alto Networks case was
20 unethical in the assertions?

21 Q. No. Was it unethical for Fortinet to sue
22 Palo Alto Networks on patents that it didn't invent,
23 that it just purchased?

24 A. I don't -- I don't believe so.

25 Q. Have you ever met the principals of Network

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1 Protection Sciences?

2 A. I believe I have.

3 Q. You've met Wilford Lam?

4 A. In -- I believe so. I can't recall the
5 names of people who attended -- there were some
6 settlement conferences. I can't recall the names of
7 people that -- that attended for Network Protection
8 Sciences. I assume that at least one, maybe both,
9 of the principals. I think there might be two.

10 Q. Yes. Do you think you met Rakesh Ramde
11 also?

12 A. If they attended the settlement
13 negotiation, I -- I, at least in passing, would
14 have.

15 Q. Besides the settlement negotiation, have
16 you met them in the hallways in court?

17 A. I believe I've seen them in the hallways at
18 court.

19 Q. And have either of them done anything to
20 personally insult you?

21 A. Done anything -- I've met them in passing.
22 So I don't think any words have been exchanged in
23 any of those hallway passings, or any gestures.

24 Q. Do you know whether either of them have
25 lied or been dishonest in any way?

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1 MR. COOPER: Same objection; same
2 instruction.

3 THE WITNESS: To the extent -- to the
4 extent -- to the extent that I know anything about
5 their acts or behaviors or statements, it would be
6 in the context of this litigation, and it would have
7 been received from counsel. And I believe it would
8 be privileged.

9 Our public filings would not be privileged,
10 though. And there is a -- a current motion to
11 dismiss that has been filed. And that contains
12 facts that would suggest ...

13 MR. CUKOR: Q. Suggest what?

14 A. Oh, I'm sorry. Suggest -- I can't recall
15 the entirety of the filing, but there were --
16 there -- there were --

17 MR. COOPER: Would you like to have the
18 question read?

19 THE WITNESS: No, it ...

20 MR. CUKOR: Please don't interrupt the
21 witness. This is the second time I'm instructing
22 you.

23 THE WITNESS: The -- I believe the question
24 is whether I'm aware of any sort of lying or
25 fraudulent behavior.

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1 MR. COOPER: We can read it -- the question
2 if you'd like.

3 THE WITNESS: Can I have the question,
4 please.

5 (Record read as follows:

6 QUESTION: Do you know whether either
7 of them have lied or been dishonest in any
8 way?)

9 THE WITNESS: Oh, that was -- whether they
10 have lied or been dishonest in any way. So -- and
11 again, I -- I've had no interactions with them in
12 the court -- in the meetings. I have had -- and
13 they're -- they're privileged communications,
14 certainly.

15 But there is a public filing that includes
16 specific facts that -- that are in the public filing
17 in the motion to dismiss.

18 MR. CUKOR: Q. And do you think that those
19 facts suggest that either Mr. Lam or Mr. Ramde have
20 lied?

21 A. Yes.

22 Q. What facts are those?

23 A. We -- it's not something I've -- I've read
24 since it was filed. I -- I recall generally some of
25 the allegations about the -- I think there were

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1 verified filings. I believe there were statements
2 in various court filings about a Texas entity.
3 There were statements about an employee, purported
4 employee of NPS.

5 Again, I think that -- I prefer to have the
6 document in front of me, and I can tell you. I
7 mean, I can read it and tell you exactly what's in
8 it.

9 Q. So what was the lie that you think -- that
10 you're recalling right now, and who made it?

11 A. I'm just -- I'm -- I'm -- I'm remembering
12 the filing is what I meant, the public filing. I
13 think that would be the nonprivileged basis for that
14 suggestion. And I -- and I think that those facts
15 are -- are laid out in the motion to dismiss.

16 Q. What is the specific lie that you can
17 recall, if any?

18 A. I think I -- I think I've told you. So
19 there's -- about the headquarters in Texas, about
20 the -- the -- the employee who apparently wasn't an
21 employee, the employee's title that wasn't in fact
22 the employee's title, the assignment being complete,
23 though I don't know that that would be a lie, but
24 rather, a sort of massaging or avoiding the truth,
25 you know.

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1 I think it's pretty well spelled out in the
2 motion to dismiss, which I have read.

3 Q. So you're convinced -- let me ask you this
4 way: Are you convinced that the motion to dismiss
5 supports the allegation that Mr. Ramde is a liar?

6 A. I think what you're asking for is, again,
7 digging into my evaluation of the merits of sort of
8 the current -- you know, sort of our internal
9 thinking -- Fortinet's internal thinking on the
10 legal merits and the legal strategy. And I -- I
11 think that would be -- the entire basis would be
12 privileged. And I think that question's
13 inappropriate.

14 Q. I'm asking in your personal capacity based
15 on the facts that you just identified as being
16 publicly available. Do you consider Mr. Ramde to be
17 a liar?

18 MR. COOPER: Same objection; same
19 instruction.

20 THE WITNESS: You -- so you're doing the
21 same thing, where I -- most of the work that we're
22 talking about is the work that I've done in my
23 capacity as a lawyer in defending this litigation.

24 So you're essentially, as I understand the
25 question, saying in my personal capacity. So taking

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1 off my lawyer hat and reading that
2 publicly-available motion to dismiss, would it
3 convince me.

4 And I -- and I have a hard time -- I have a
5 hard time separating that and going through that
6 mental exercise. And I don't -- I don't see how
7 that would be relevant.

8 MR. CUKOR: Q. Be that as it may, based on
9 the facts that are disclosed that you identified
10 before in the motion to dismiss, do you personally
11 consider Mr. Ramde to be a liar?

12 MR. COOPER: Same objection; same
13 instruction.

14 THE WITNESS: If I -- okay. So you want me
15 to go through the exercise of pretend- -- you know,
16 excluding from my mind all facts and all
17 circumstances and all communications that I believe
18 are privileged in this case and put -- pretend that
19 I was reading that motion to dismiss as an objective
20 third party, would it convince me. I -- I find it
21 compelling.

22 MR. CUKOR: Q. Compelling that he is a
23 liar?

24 A. I -- with the conclusion that -- with
25 the -- the -- the factual assertions made in it and

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1 the present -- the present -- basically, I find it
2 well written and compelling in what it says.

3 Q. Okay. Are you avoiding saying it? I mean,
4 you're calling the man a liar, so own it.

5 A. I believe that that word, "liar,"
6 "fabrication" -- I can't recall the exact words. I
7 believe the words are right there in that paper.
8 And I -- again, this is an artificial exercise that
9 you're asking me to go through.

10 Do I find the motion to dismiss compelling?
11 Yes.

12 Q. Do you believe Mr. Ramde is a liar?

13 MR. COOPER: Same objection; same
14 instruction.

15 THE WITNESS: Again, the only interaction I
16 have with Mr. Ramde that I can recall -- 'cause I
17 don't recall ever speaking to him, even in the
18 context of the earlier settlement negotiation, if
19 indeed he was present -- passing in the hall,
20 without saying a word, on one or two or three,
21 however many occasions it was, at court.

22 So the entirety of my basis for answering
23 that question is, having read this motion to dismiss
24 and pretending I -- I know nothing else, because
25 the -- all the other stuff is privileged, would I be

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1 convinced that that person is a liar. I'm saying
2 that I find the motion-to-dismiss papers compelling.

3 MR. CUKOR: Q. So you don't want to answer
4 the question?

5 A. I'm -- I'm answering it to the best of my
6 ability.

7 Q. Okay. You don't think that the best of
8 your ability includes the ability to give me a "yes"
9 or "no" answer on whether you believe Mr. Ramde is a
10 liar?

11 A. No, that's a much broader conclusion that
12 you're asking -- you're asking for. You're asking
13 for a personal statement against a person based on
14 reading one -- you know, based on reading a motion
15 to dismiss and making that general -- I think it's
16 fact-specific that -- so -- so again, we're only --
17 the only interaction that you're asking me to base
18 my conclusion on is that paper.

19 So reading that paper is context-specific
20 and it says what it says, and I find it compelling
21 for what it says.

22 And limited to what it says, do I want to
23 draw, you know, broader conclusions about the people
24 involved? You know, I don't think that's right.

25 Q. Okay. What role do you -- let me -- let me

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1 start again.

2 What roles do you have at Fortinet --
3 that's not a great way of asking it.

4 What are your job responsibilities at
5 Fortinet?

6 A. Currently?

7 Q. Currently.

8 A. I -- I am spread pretty thin and have a
9 variety of job responsibilities. Litigation is one
10 of the responsibilities. I work on litigation
11 matters.

12 As I mentioned earlier, I supervise the
13 patent program. And I'm also involved in a number
14 of general commercial legal issues as they -- as
15 they come up.

16 I assist, you know, as -- as I'm called
17 upon on an as-needed basis to assist with public
18 filings, and I work on corporate development.

19 Q. Is your work primarily intellectual
20 property focused?

21 A. My work -- I mean, my expertise, my
22 personal background, is intellectual property and
23 tech -- technology focused. I think technology
24 focused is a better way of putting it.

25 Q. Okay. Are you involved with all of the --

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1 let me start again.

2 Have you been involved with all of the
3 intellectual property licenses or purchases that
4 Fortinet has been involved with?

5 A. Yes. Some to a larger extent; some to a
6 lesser extent. I'm thinking there might be -- but
7 I've -- I've been there for all of them.

8 Q. And does your -- do your job
9 responsibilities at Fortinet cause you to be
10 involved in reexamination proceedings at all?

11 A. So you're asking if I have been involved
12 with reexamination proceedings before the PTO during
13 my tenure at Fortinet?

14 Q. We can ask it that way. It's a general
15 lead-up question.

16 A. I have been involved with reexamine- --
17 patent reexamination proceedings before the PTO.

18 Q. You have been involved with patent
19 reexamination proceedings before the PTO, correct?

20 A. Yes.

21 Q. How many?

22 A. I don't know the exact number.

23 Q. Approximately.

24 A. Maybe around ten.

25 Q. Do you feel that you have an expertise in

1 patent reexamination procedures?

2 A. Expertise. I -- I have been involved with
3 a number of patent reexaminations. I do have a
4 certain amount of expertise with technology based on
5 my technology background, and I believe I had some
6 value on -- personally -- on the -- in that -- the
7 reexamination context.

8 Q. Is that one of your strongest suits?

9 A. I'm not -- I'm not -- I'm not sure what
10 you -- what do you mean by "strongest suits"? Is it
11 something I'm particularly proud of or -- you know,
12 technology -- I mean, I have a lot --

13 Q. Are patent reexaminations something you're
14 particularly good at?

15 A. I'm sure there'd be a variety of opinions
16 on -- on that question.

17 Q. Do you consider yourself particularly good
18 at patent reexaminations?

19 A. Other people -- I -- I retain counsel to
20 assist me with reexamining -- reexamination
21 proceedings, and I have been involved with a number
22 of reexamination proceedings, and that has given me,
23 I believe, some experience with reexamination
24 proceedings.

25 Q. Is there any objective evidence that you

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1 have that other people consider you particularly
2 good at reexamination proceedings?

3 A. Have I received objective evidence from
4 other people? I've had some successes with
5 reexamination proceedings, if that's what you mean
6 by "objective evidence." And I have received
7 compliments on some reexamine- -- some of my
8 reexaminations.

9 Q. Do you ever receive any job offers to do
10 reexamination proceedings or supervise them?

11 A. Not formal job offers, no.

12 Q. Has anyone indicated to you that they would
13 like you to consider working for them in connection
14 with supervising reexamination proceedings?

15 A. I've chatted -- I've spoken with a number
16 of attorneys in the ordinary course of being a
17 lawyer over the last so many years, and various
18 lawyers have -- have mentioned that I would be an
19 asset to a litigation department based on my
20 reexamination proceedings, other litigation work and
21 technical background, if that's what you're asking.

22 MR. CUKOR: Let's change the tape now.

23 THE VIDEOGRAPHER: We are going off the
24 record. The time is 12:06 p.m. Here marks the end
25 of videotape number 1 in the deposition of

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1 Todd Nelson.

2 (Recess taken.)

3 THE VIDEOGRAPHER: We are back on the
4 record. The time is 12:12 p.m. Here marks the
5 beginning of videotape number 2 in the deposition of
6 Todd Nelson.

7 MR. CUKOR: Q. After Network Protection
8 Sciences filed the complaint in this action against
9 Fortinet, did Fortinet obtain an opinion of counsel
10 that it did not require a license under the '601
11 patent?

12 MR. COOPER: I'm going to object to the
13 question as calling for attorney/client-privileged
14 communications and instruct the witness not to
15 answer to the extent it would reveal such
16 communications.

17 MR. CUKOR: Well, it will reveal such
18 communications.

19 Q. So I'm asking you are you choosing to waive
20 that privilege or not? So I'm being clear about it.
21 If you -- if you take the privilege, then you won't
22 be able to rely on the opinion of counsel at trial,
23 or your counsel can direct you at that -- about
24 that. But it is -- it is directed to a privileged
25 issue that you can either choose to waive or not

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1 waive.

2 MR. COOPER: I'm going to instruct the
3 witness not to answer the question.

4 THE WITNESS: I'm not going to answer the
5 question.

6 MR. CUKOR: Okay.

7 Q. So there is no opinion of counsel that
8 Fortinet intends to rely on at trial to support its
9 position that it does not require a license under
10 the '601 patent?

11 MR. COOPER: Going to instruct the witness
12 not to answer the question based on attorney/client
13 privilege.

14 THE WITNESS: I believe the answer's
15 privileged.

16 MR. CUKOR: Q. Okay. With regard to the
17 issue of willfulness, did Fortinet do anything to
18 determine whether it was required to take a license
19 under the '601 patent before it continued to sell
20 the accused products?

21 MR. COOPER: Object. Going to instruct the
22 witness not to answer the question to the extent
23 that it would reveal any attorney/client-privileged
24 communications.

25 MR. CUKOR: Are you letting him answer the

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1 question or not?

2 MR. COOPER: I'm letting him answer the
3 question to the extent that he can, if he can,
4 without revealing attorney/client-privileged
5 communications.

6 THE WITNESS: I'm thinking about this one.
7 Can -- can I have the question read back,
8 please.

9 (Record read as follows:

10 QUESTION: With regard to the issue of
11 willfulness, did Fortinet do anything to
12 determine whether it was required to take a
13 license under the '601 patent before it
14 continued to sell the accused products?)

15 THE WITNESS: I mean, I think you're
16 asking -- the equivalent question is did we get an
17 opinion of counsel, and what's the -- with respect
18 to the -- the issue of willfulness. I'm having a
19 little bit trouble parsing how this is different
20 than the question did we obtain an opinion of
21 counsel, which I believe is -- is privileged.

22 MR. CUKOR: Q. So Network Protection
23 Sciences sued Fortinet in this case, right?

24 A. Yes.

25 Q. And the complaint alleges that Fortinet's

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1 products infringe the '601 patent, correct?

2 A. Yes.

3 Q. And Fortinet has not in any way ceased
4 manufacturing, distributing or selling any of its
5 products based on the complaint, correct?

6 MR. COOPER: I'm going to instruct the
7 witness not to answer that question to the extent
8 that it would reveal any attorney/client-privileged
9 communications.

10 THE WITNESS: Fortinet still sells the --
11 you know, at least certain of the products on the
12 accused products list today, yes.

13 MR. CUKOR: Q. Have any of the accused
14 products been removed from -- from Fortinet's
15 product list as a result of this litigation?

16 MR. COOPER: Same instruction.

17 THE WITNESS: No.

18 MR. CUKOR: Q. Did Fortinet reevaluate its
19 decision to continue to sell its accused products
20 after the reexam was concluded?

21 MR. COOPER: Same objection; same
22 instruction.

23 THE WITNESS: I think you're asking whether
24 we considered the results of the reexam and the
25 implication of -- of those results after they came

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1 in.

2 Certainly I looked at the results of the
3 reexam. And then to the extent that, you know, I
4 acted upon them or we did further analysis, I
5 believe that would be privileged, all entirely
6 privileged communications.

7 MR. CUKOR: Q. But after you looked at the
8 results of the reexam, did Fortinet withdraw any of
9 its -- any of the accused products from market?

10 MR. COOPER: Same objection; same
11 instruction.

12 THE WITNESS: Fortinet has a -- a regular
13 life cycle of end-of-lifing products. And I don't
14 know of this for a fact, but I would be surprised to
15 learn that products on the accused list hadn't been
16 end-of-lifed during that time period.

17 MR. CUKOR: Q. Were any of the products
18 that were on the accused product list end-of-lifed
19 as a result of the results of the reexam?

20 MR. COOPER: Same objection; same
21 instruction.

22 THE WITNESS: No.

23 MR. CUKOR: Q. Do you have a personal
24 belief about the validity of the '601 patent?

25 MR. COOPER: Same objection; same

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1 instruction.

2 THE WITNESS: I think we've -- we've
3 already explored this, and -- and I've -- I've said
4 that I was unaware of the existence of Mr. Vu, of
5 the '601 patent, prior to being sued. And the
6 entirety of my knowledge about Mr. Vu and the '601
7 patent and all related facts are specific to this
8 litigation, and thus, I think, privileged.

9 MR. CUKOR: Q. So you don't have a
10 personal belief?

11 MR. COOPER: Same objection; same
12 instruction.

13 THE WITNESS: To the extent I have a
14 personal belief, it's entirely based on -- on my --
15 my work in the context of this litigation.

16 MR. CUKOR: Q. Okay. So let me get my
17 questions out. And it may be that you'll just say
18 "privileged," and that's fine.

19 Do you have a personal belief about the
20 validity of the '601 patent?

21 MR. COOPER: Same objection; same
22 instruction.

23 MR. CUKOR: That's a "yes" or "no"
24 question. I don't think it would reveal any
25 privilege.

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1 THE WITNESS: I think it's not a "yes" or
2 "no" question. I think the -- to the extent I have
3 a belief about the validity of the '601 patent, it
4 would be entirely based on facts gleaned during --
5 during the course of this litigation and actively
6 pursuing this litigation and in active communication
7 with outside counsel.

8 MR. CUKOR: Q. Okay. But based on all
9 that, just have you formed a personal belief about
10 the validity of the '601 patent?

11 MR. COOPER: Same objection; same
12 instruction.

13 THE WITNESS: Again, I've -- I've -- I've
14 said to the extent that there -- one has been
15 formed, it's entirely based on that. Do I have a
16 belief about the validity of the patent? Yes.

17 MR. CUKOR: Q. Okay. And did that belief
18 change in any way after you considered the results
19 of the reexam?

20 MR. COOPER: Same objection; same
21 instruction.

22 THE WITNESS: Again, I -- the -- the
23 reexam, the consideration of the reexam, the
24 consideration of this patent, all of that is
25 entirely during the context of this litigation and

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1 in communication with outside counsel, whether it be
2 patent counsel, litigation counsel.

3 MR. CUKOR: Q. Did your personal belief
4 about the validity of the '601 patent change in any
5 way as a result of the results of the reexam?

6 MR. COOPER: Same objection; same
7 instruction.

8 THE WITNESS: That's the question you just
9 asked word for word, isn't it?

10 MR. CUKOR: It's the same idea I'm trying
11 to get across. I think you -- you've said some
12 things before, but you didn't say "I'm not answering
13 because of privilege" or --

14 THE WITNESS: And these are ones where we
15 get -- where it gets a little bit tricky because
16 you're asking about, you know, sort of what's going
17 on behind, you know, the curtain, behind our
18 litigation.

19 MR. CUKOR: I'm not asking what the -- what
20 your beliefs were. I haven't asked that. I'm just
21 asking if your belief changed in any way -- your
22 personal belief about the validity of the '601
23 patent changed in any way as a result of the reexam.

24 MR. COOPER: Same objection; same
25 instruction.

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1 THE WITNESS: I believe you're asking me
2 for -- for privileged communications and -- and --
3 and privileged work product and -- and sort of
4 litigation assessment, evaluations and strategies,
5 which I don't think are appropriate and I think are
6 privileged.

7 MR. CUKOR: Q. So you're not answering
8 based on privilege?

9 A. Correct.

10 Q. Okay. How did the reexamination results
11 affect the value of the '601 patent?

12 MR. COOPER: Same objection; same
13 instruction.

14 THE WITNESS: I have -- I have no opinion
15 about that.

16 MR. CUKOR: Q. In the course of your
17 career in dealing with intellectual property
18 licensing, do you believe that a patent that has
19 survived the reexamination is more valuable than a
20 patent that has not?

21 A. It depends on the patent and it depends on
22 the reexamination.

23 Q. In what situation would a patent surviving
24 a reexamination with all of its claims intact make
25 the patent more valuable?

1 A. If -- if there was a patent that had a
2 sub- -- you know, a substantial -- substantive -- I
3 think that's sort of duplicative -- a substantial
4 reexamination -- again, it's very -- it's very hard
5 to answer that in a fact-specific way.

6 But if you had a very substantial
7 reexamination that considered a -- that -- where the
8 examiner considered a broad range of art and reached
9 a conclusion based on a broad range of the -- the
10 applicable art, and there wasn't -- you know, there
11 was the absence of -- of any sort of disclaimer
12 during the prosecution -- so it's complicated -- I
13 believe -- I believe that at least some people
14 would -- would -- would -- would find the value to
15 be increased.

16 Q. And the '601 patent went through
17 reexamination, correct?

18 A. Yes.

19 Q. And it was a reexamination that you
20 supervised?

21 A. Yes.

22 Q. And all of the claims were confirmed,
23 correct?

24 A. The reexam certificate issued, and I do not
25 believe any of the claims were cancelled.

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1 Q. And in fact, new claims were added,
2 correct?

3 A. The -- new claims were added during
4 pros- -- during the reexamination, yes.

5 Q. So the '601 patent came out of
6 reexamination with more claims rather than less
7 claims, correct?

8 A. Numerically, yes.

9 Q. And during the '601 patent reexamination,
10 all of Fortinet's invalidity contentions were
11 disclosed to the Patent & Trademark Office, correct?

12 MR. COOPER: Objection -- excuse me. Same
13 objection; same instruction.

14 THE WITNESS: The -- the patent
15 reexamination is a public record. I do not know the
16 answer to the question that you're asking. I -- I
17 know certain art was disclosed, but I don't think it
18 was considered in any way by the examiner. That's
19 my memory of it.

20 MR. CUKOR: Q. Is it your memory that all
21 of Fortinet's invalidity contentions were disclosed
22 to the Patent & Trademark Office during the
23 reexamination?

24 MR. COOPER: Same objection; same
25 instruction.

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1 THE WITNESS: I said I -- I don't know the
2 answer to that.

3 MR. CUKOR: Q. Okay. And is it true that
4 Network Protection Sciences did not disclaim any
5 scope of the patent during the reexamination?

6 MR. COOPER: Same objection; same
7 instruction.

8 THE WITNESS: I don't believe that that's
9 accurate.

10 MR. CUKOR: Q. You believe there was a
11 disclaimer of scope?

12 A. It's a more complicated question of law.
13 But I know that there were arguments made during the
14 reexamination proceedings with respect to a very
15 discrete set of art.

16 Q. Did Network Protection Sciences file any
17 disclaimer?

18 A. Not that I'm aware of.

19 Q. Based on all of that, do you consider the
20 '601 patent to be more valuable for having survived
21 the reexamination?

22 A. So I think we're back to the privilege
23 issue, but if we go into the abstract, which is
24 where you -- and take myself out of this litigation,
25 and if I was not in this litigation, say before this

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1 litigation started -- I'm trying to help you to --
2 in answering this in a nonprivileged way.

3 If I was looking at this reexamination in
4 the abstract -- that's just hard to -- to --

5 Q. No, keep it -- if you can't answer because
6 of privilege, that's fine.

7 A. Yeah, I -- it's too bound up with work
8 that's -- that's privileged.

9 Q. Okay. Do you agree that the reexam did not
10 go as planned for Fortinet?

11 MR. COOPER: Same objection; same
12 instruction.

13 THE WITNESS: The -- the -- I think most of
14 that's privileged. But there's never a plan
15 necessarily. I mean, I don't -- go as planned.

16 MR. CUKOR: Q. Well, wasn't the plan of
17 the reexam to invalidate at least certain claims of
18 the '601 patent?

19 MR. COOPER: Same objection; same
20 instruction.

21 THE WITNESS: I -- I think, again, we're --
22 it's very difficult to answer -- much as I would
23 love to have this discussion, you know, off the
24 record, I think that to the extent there's a -- that
25 there's any knowledge, any basis, all of it's

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1 privileged.

2 All of it is asking me about litigation
3 strategy, litigation communications with outside
4 attorneys, evaluations of the -- what was -- what
5 was reexamined, evaluations of the scope of the art
6 that was presented. And I don't think it's
7 appropriate and I think it's privileged.

8 MR. CUKOR: Q. Okay. Has Fortinet entered
9 into any joint defense agreement with any other
10 party under which it can share information about the
11 '601 patent?

12 MR. COOPER: Same objection; same
13 instruction.

14 THE WITNESS: I believe there was a joint
15 defense agreement early in the case in Texas.

16 MR. CUKOR: Q. And who were the parties?
17 Was Juniper a party to it?

18 A. I believe it would be. I believe it was
19 the set of defendants named by NPS. But there was
20 some movement amongst defendants. DeepNines may not
21 have been a party or they were a party, they got
22 broke or got bought by somebody. There's a
23 little -- something went on there.

24 Q. So let me ask you in a easier, broken-down
25 way. There was a joint defense agreement that

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1 Fortinet was a part of in connection with this
2 litigation, correct?

3 A. I believe that's correct. It's been a long
4 time.

5 Q. And Juniper was a part of it?

6 A. I believe that's the case.

7 Q. And WatchGuard was a part of it?

8 A. I believe that's the case.

9 Q. And SonicWALL was a part of it?

10 A. Yes, I believe they were also named
11 defendants.

12 Q. And these defendants were able to share
13 information with each other about the validity of
14 the '601 patent, correct?

15 A. Able to share?

16 Q. Under the joint defense agreement, Juniper,
17 SonicWALL and WatchGuard shared information with
18 Fortinet about the potential invalidity of the '601
19 patent, correct?

20 MR. COOPER: Same objection; same
21 instruction.

22 THE WITNESS: I believe you're -- you're
23 asking for privileged communications to the extent
24 that the privilege, you know, is extended to -- to
25 joint defense groups, which I believe it is.

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1 So I mean, there was a joint agreement.
2 And the defendants did communicate with each other
3 pursuant to that defense agreement.

4 MR. CUKOR: Q. So is it accurate to say
5 that in preparing the reexamination of the '601
6 patent, Fortinet had access to the work product of
7 Juniper, WatchGuard and SonicWALL?

8 MR. COOPER: Same objection; same
9 instruction.

10 THE WITNESS: What do you mean by "work
11 product"?

12 MR. CUKOR: Q. In preparing the
13 reexamination proceeding that Fortinet prepared
14 against the '601 patent, Fortinet had access to the
15 prior art identified by Juniper, SonicWALL and
16 WatchGuard.

17 MR. COOPER: Same objection; same
18 instruction.

19 THE WITNESS: I'm not sure that's true.

20 MR. CUKOR: Q. Did Juniper, SonicWALL or
21 WatchGuard share any prior art information with you?

22 MR. COOPER: Same objection; same
23 instruction.

24 THE WITNESS: During the entire pendency
25 the case or --

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1 MR. CUKOR: Yes.

2 THE WITNESS: -- prior to the reexam?

3 MR. CUKOR: Q. During the entire pendency
4 of the case, has Juniper WatchGuard or SonicWALL
5 shared any prior art information with you?

6 MR. COOPER: Same objection; same
7 instruction.

8 THE WITNESS: I think now you're asking for
9 substance of -- can I have another -- I didn't
10 realize we'd be going down this line of questions
11 and going into the reexamination and the joint
12 defense group, so I -- it's not an issue I've
13 carefully researched. I should probably know that,
14 but I believe the substance of those communications
15 are privileged, and I wouldn't want to -- you know,
16 and there's no intent to the extent that I -- to
17 inadvertently waive a privilege.

18 MR. CUKOR: Yes, I understand that. And I
19 wouldn't suggest that this would be a waiver of
20 privilege because I think I'm asking you the
21 question that is at a level of just was information
22 shared, not what the specific information was.

23 And I wouldn't ask you or I don't plan to
24 ask you what information was shared. So I just want
25 to ask you at a high level.

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1 Q. Did Juniper, SonicWALL or WatchGuard share
2 prior art information with Fortinet?

3 MR. COOPER: Same objection.

4 THE WITNESS: Again, I --

5 MR. COOPER: Same instruction.

6 THE WITNESS: -- I think you're -- you're
7 asking about the substance of the -- did we have
8 communications during the pendency of the suit?
9 Yes. I probably sort of overstepped the bounds to
10 say was there communication in advance of the
11 reexam. I -- I thought, you know, perhaps no, but
12 I'm not sure.

13 But again, I think now you're getting into
14 the substance of what was shared and when was it
15 shared. And I -- and I think that that would be
16 privileged. But I'm -- again, on the joint defense
17 privilege, I'm -- I'm fuzzy at best. And I'd be
18 happy to take a break and consult with outside
19 counsel so I can understand the scope of it and
20 fully answer.

21 MR. CUKOR: Okay. You can do that if you
22 want on the break, but I don't plan to ask you any
23 more questions about that.

24 THE WITNESS: Okay.

25 MR. CUKOR: Q. What was your personal role

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1 in collecting prior art in this case?

2 MR. COOPER: Same objection; same
3 instruction.

4 THE WITNESS: So again, this is funny.
5 I've never been deposed in this way, where I'm being
6 asked about what did I do as a lawyer during the
7 pendency of a litigation by the plaintiff, you know,
8 on the other side of the litigation.

9 MR. CUKOR: So --

10 THE WITNESS: It seems to be all very much
11 asking what I did, how I did it, why I did it.

12 MR. CUKOR: Q. For example, did you -- if
13 you told me "I directed counsel to handle the prior
14 art issue," then I think that's fine.

15 But did you personally do any research to
16 find prior art?

17 MR. COOPER: Same objection; same
18 instruction.

19 MR. CUKOR: Q. Did you search the
20 Internet?

21 A. So again, you're asking me about during the
22 pendency of defending this case and in my active
23 involvement of defending this case and working with
24 my outside counsel and in working with the joint --
25 you know, potentially with the joint defense groups,

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1 what -- what did I actually do?

2 You know, the -- maybe during the lunch
3 break I could take -- I could confer a little bit
4 'cause I actually get a little fuzzy on this, on
5 exactly what I can answer and can't answer.

6 Privilege is not one of -- sort of my areas of
7 expertise.

8 And again, I thought I was preparing
9 primarily for 30(b)(6) topics, none of which
10 we've -- and we've hardly -- barely glanced at in
11 the couple of hours that we've been going.

12 So I'm -- I'm -- I'm just a little bit
13 surprised and not -- not necessarily prepared to --
14 to answer it as artful -- you know, as gracefully as
15 I could.

16 MR. CUKOR: Q. Did you ever get on a plane
17 and travel to find prior art?

18 MR. COOPER: Same objection; same
19 instruction.

20 THE WITNESS: It's -- it's -- what did I do
21 to -- did I collect prior art? Did -- what did I do
22 to collect prior art? Did I get on a plane to
23 collect prior art? To me it's the same line of
24 question.

25 I'd love to clarify that and make sure that

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1 I -- I mean, if I -- if that's okay to answer, I'm
2 happy to answer the questions.

3 MR. CUKOR: Q. Let me ask it this way:
4 Have you been to Canada recently?

5 A. No.

6 Q. When was the last time you were in Canada?

7 A. Oh, a year ago.

8 Q. Where did you go?

9 A. I went to -- I -- I flew into -- where did
10 I go. I flew into a U.S. city near the border to --
11 I can't recall the name of the city. I flew into a
12 U.S. city, rented a car and drove over into Canada.
13 And it might have been Ottawa. Is that a city?
14 Sorry. I don't know my geography in Canada very
15 well, and I mix up -- we have -- we have a number of
16 offices in Canada, and so I mix up the cities, to
17 my -- you know, to the amusement of my coworkers.

18 Q. Did you ever meet with any people from
19 Janus?

20 A. Have I ever met with people from Janus.
21 And what do you mean by "Janus"?

22 Q. Are you familiar with the Janus firewall
23 product?

24 A. Yes.

25 Q. Have you ever met with any of the people

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1 that were involved with that -- development of that
2 product?

3 A. Yes.

4 Q. When was that?

5 A. That was during the trip that I -- I don't
6 remember the exact date.

7 Q. Who was with you?

8 A. There were -- there was -- there were two
9 attorneys from one of the joint defendants.

10 Q. Who were -- what were their names?

11 A. David Benny and -- I can't recall the other
12 person's name.

13 Q. Someone from Juniper?

14 A. No. Also -- also from --

15 Q. WatchGuard?

16 A. They represented WatchGuard, I believe.

17 Q. And was anybody from your law firm or a law
18 firm representing Fortinet present?

19 A. No.

20 Q. And who did you meet with?

21 A. I have met with John Alsup, Glen
22 Mackintosh. I'm not good with names. There were
23 probably four or five other people, but I can't -- I
24 can't recall the names.

25 Q. Where did you meet with them?

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1 A. I met with John Alsup in the WatchGuard
2 offices. And I met with the other people, Glen
3 Mackintosh and others -- I just can't recall the
4 names -- at a restaurant.

5 Q. Everybody at the same time?

6 A. Some people arrived late.

7 Q. Has Fortinet ever offered to compensate
8 those people for their time?

9 MR. COOPER: Same objection; same
10 instruction.

11 THE WITNESS: I don't know for sure. I
12 know that -- I believe that John Alsup has been
13 retained by Fortinet.

14 MR. CUKOR: Q. Has Fortinet offered to
15 compensate any of the other individuals you met
16 with?

17 MR. COOPER: Same objection; same
18 instruction.

19 MR. CUKOR: Are you instructing him that
20 it's privileged whether he paid or offered to pay a
21 fact witness?

22 MR. COOPER: I'm repeating the same
23 objection that I've made numerous times, and that is
24 that he may answer to the extent that he is not
25 revealing attorney/client-privileged communications.

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1 MR. CUKOR: And you think that there's
2 potential attorney/client privilege in this?

3 MR. COOPER: I think that there is the
4 potential for the witness to answer the question and
5 divulge attorney/client privilege, yes.

6 THE WITNESS: I do not -- it -- it's
7 possible, but it also might -- that was at a time
8 when we were part of a joint defense group, so I'm
9 not sure if Fortinet would have made an offer or
10 suggested that or whether a different member of the
11 joint defense group could have. I just don't know.

12 MR. CUKOR: Q. But your recollection is
13 that somebody made an offer for -- to compensate the
14 people that you met with in Canada?

15 MR. COOPER: Same objection; same
16 instruction.

17 THE WITNESS: I don't think an offer
18 ever -- there was a suggestion of that potential,
19 but I don't think an offer ever was made.

20 MR. CUKOR: Okay. How are you holding out?

21 THE WITNESS: I'm okay. I actually -- in
22 not too long, I -- rest room and lunch would be
23 great.

24 MR. CUKOR: It's --

25 THE WITNESS: And I could check on some of

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1 the privilege issues to try to get a little bit of
2 clarity in my own mind about it. It might help us
3 move faster.

4 MR. CUKOR: You're welcome to do that.
5 It's 12:45. Do you want to keep going for
6 another -- I'm at the -- kind of close of the
7 section.

8 MR. COOPER: It's been about a half-hour
9 since we --

10 THE WITNESS: Why don't we -- why don't
11 we -- why don't we take a -- how long do you think
12 lunch will take?

13 MR. COOPER: Forty-five minutes is what we
14 took yesterday.

15 MR. CUKOR: It's really up to you.

16 THE WITNESS: No. That would be fine. I'm
17 just trying, in the -- I'm just trying to
18 accommodate everybody and yet move relatively
19 quickly.

20 MR. CUKOR: Let's take a break.

21 THE WITNESS: Okay.

22 THE VIDEOGRAPHER: Going off the record.
23 The time is 12:45.

24 (Lunch recess from 12:45 to 1:44.)

25 ///

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1 AFTERNOON SESSION 1:44 P.M.

2 THE VIDEOGRAPHER: We are back on the
3 record. The time is 1:44 p.m.

4 EXAMINATION RESUMED BY MR. CUKOR

5 MR. CUKOR: Q. What is the compensation
6 you receive from your job at Fortinet?

7 A. Currently or historically?

8 Q. You can answer both.

9 A. I'm right in the middle of a -- I think
10 I -- I've got a midyear adjustment. I assumed it
11 kicked -- kicked in or it's kicking in within days.
12 I think it's a combination of cash and equity
13 incentives.

14 I think my base salary is 240. I'm on a
15 bonus -- MBO, management by objective, bonus plan
16 that would cap out at 60. And I get -- I have some
17 options in restricted stock.

18 MR. COOPER: Pardon the interruption. I
19 apologize, but I'd like to take this opportunity to
20 mark the transcript highly confidential, attorneys'
21 eyes only. Thank you.

22 MR. CUKOR: Q. What is your estimate of
23 what your stock compensation portion of your package
24 is worth?

25 A. It's fairly random. It varies. So you

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1 can't really -- I vest. And annually there will be
2 a refresh -- refresh grant generally. And so then
3 each refresh grant vests periodically.

4 Q. Is there a rough number? Is it between
5 50,000 and a hundred thousand?

6 A. Are you talking dollars or shares or ...

7 Q. Dollars, in terms of value.

8 A. Current -- I mean, currently -- it's
9 actually fairly complicated. So right now, I mean,
10 I've got grants that have long since expired and
11 been exercised and are gone. I think I've got maybe
12 two option grants with some residual on them. I
13 think they're fairly near the end of life, of the
14 four-year vesting period. And I have two, maybe
15 three -- maybe it's just two -- restricted stock
16 grants that have yet to begin vesting.

17 Q. So do you have any kind of estimate for
18 what the stock component of your compensation
19 package is roughly worth?

20 A. I mean, no. I mean, it really changes very
21 dramatically with the stock price.

22 Q. Could it be hundreds of thousands of
23 dollars?

24 A. No. On an annual basis with my current set
25 of grants, that would be -- the stock price would

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1 have to go through the roof for that to -- for it to
2 be that level.

3 I mean, the last -- at today's value, if
4 you add up -- I think I get a report -- the total --
5 I think of the total, sort of potential value -- and
6 again, that would be over all of these overlapping
7 four-year periods. But the total value of
8 everything, as if everything had accelerated and
9 vested right now, would -- it hasn't, and it
10 wouldn't -- was something like -- the last time I
11 checked, probably 300,000.

12 Q. Okay.

13 A. So you can divide that by four to get some
14 sort of an idea, but that's not really accurate
15 since the vesting periods are all different.

16 Q. Okay. Do you know what Michael Xie's
17 compensation is?

18 A. No. It might be publicly disclosed in
19 our -- in our public filings. I think the named
20 executive officers have a certain amount of
21 disclosure there, but it's not something I've looked
22 at.

23 Q. Okay. Same for Ken Xie?

24 A. Correct.

25 Q. Does Fortinet -- Fortinet make sales of

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1 products to the United States government?

2 A. I believe -- I mean, we have a U.S.-fed
3 sales arm. And I -- I believe it at least attempts
4 to sell into various federal agencies.

5 Q. Do you know if it's been successful?

6 A. I mean, that's a qualitative assessment,
7 but I -- overall, I know that it hasn't been. It's
8 not a major component or -- I don't think it's
9 been -- as successful as hoped.

10 Q. I didn't mean successful qualitatively. I
11 meant have they made any sales.

12 A. There are sales. The -- there's a quota
13 and there are sales that I'm aware of. I don't know
14 the exact quotas. I know it's a relatively minor,
15 you know, part of that Fortinet business. It's not
16 a -- it hasn't been a historical focus, and it's not
17 an area that we have been particularly successful
18 in. But, I mean, they're there.

19 Q. I don't think that that information's been
20 produced in this litigation. Do you know if that
21 was done purposefully?

22 A. No. No. What's -- what -- I think it
23 would be included -- the -- in this -- I've been
24 responsible for that, largely, the collection of
25 documents in this -- during the entire pendency of

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1 this litigation. I think we've been, you know, very
2 transparent and very cooperative in producing
3 documents.

4 I don't recall anything specific to the
5 federal sales. I know that we've given overall
6 sales figures, but I -- those would include the
7 sales that were going into -- I don't think we've
8 broken those out separately, but they would be
9 included in the sales figures that we reported.

10 Q. Okay. Did you disclose the sales made to
11 Canada and South America also?

12 A. The -- we have produced all of our public
13 filings, which break out our revenue by region, by
14 years. And those -- we've been public since -- I
15 believe it was October 2009. And so all of those
16 are publicly available.

17 And I believe they've also been collected
18 and produced in this litigation.

19 That breaks it out by U.S. -- by U.S.
20 revenue, I think, by region. And U.S. revenue I
21 believe is specifically broken out. Canada and
22 Latin America might be grouped as the remainder of
23 the Americas revenue. I'm not sure. I haven't
24 really carefully studied those, but I believe it's
25 all there.

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1 Q. So have you produced the sales information
2 for the accused products for Canada and -- and Latin
3 America?

4 A. I think that's the question you just asked
5 and I just answered.

6 Q. Well, I thought that what you said -- and I
7 appreciate you trying to answer, but -- or
8 answering. I thought what you were saying was that
9 you produced publicly available information. But as
10 I understand it, you've been producing information
11 specific to the accused products in this case and
12 that you produced information about that -- the
13 accused products in connection with United States
14 sales.

15 And I'm asking if you produced information
16 in connection with the accused products for Canada
17 and South America.

18 A. I think you're referring to the report that
19 was the subject matter of Jim Bray's deposition.

20 Q. I think it was discussed at Mr. Bray's
21 deposition.

22 A. Right. And he -- Jim Bray is in our
23 finance department and is largely responsible for
24 that. I think that was -- I attended a good portion
25 of Jim's deposition, and I believe it was fairly

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1 extensively discussed. And Jim is the person in
2 finance that I've -- that I've largely relied on to
3 collect information for this case.

4 So I think this is -- this has been
5 discussed in Jim Bray's deposition. I think he
6 broke out and specifically provided U.S. sales. And
7 that report -- I think it's on the face of the
8 report -- does it say "excluding Canada and Latin
9 America."

10 Q. It, I'm sorry, does not say or does say?

11 A. I think it specifically says that it
12 excludes, I think, on the report.

13 Q. Okay.

14 A. Again, I haven't looked at that report
15 carefully except to collect it and produce it.

16 Q. Did you ask him to exclude Canada and --
17 and South America from that report?

18 MR. COOPER: Objection. The question calls
19 for attorney/client-privileged communications, and
20 the witness is instructed not to answer to the
21 extent that the answer would reveal such
22 communications.

23 THE WITNESS: You know, I mean, we -- I
24 collected and produced data in response to their
25 requests by NPS and tasked various people with

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1 helping me produce that data. I think on its face
2 it's fairly transparent and specifically says that
3 it's -- that it includes the -- in fact, I think
4 it's broken out by product and specifically says
5 it's -- it reflects U.S. sales by product.

6 MR. CUKOR: Q. So has any such information
7 like that been produced for sales made in Canada or
8 in South America?

9 A. A specific report of that -- equivalent to
10 that? I do not believe that an equivalent report to
11 that for Canada or for Latin America has been
12 produced in this case.

13 Q. Okay. Why not?

14 A. I -- I'm not sure that it's -- that it
15 would be relevant or -- or that it's -- again, the
16 case has been going on for a number of years.
17 Discovery's been open for a long time. So I can't,
18 off the top of my head -- without sort of looking at
19 a specific request for documents, I can't -- I can't
20 recall the exact scope of my -- you know, I've been
21 tasked with diligently collecting and producing that
22 stuff and generating reports reflecting data that
23 was requested by NPS.

24 And I think we've -- we've been responsive
25 to those. I'd have to look and see what -- what

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1 was -- you know, what was requested and then take a
2 look at the scope of what we responded with.

3 Q. Do you have a feel for what the percentage
4 of Fortinet, Inc.'s revenue comes from sales in
5 Canada?

6 A. That issue was specifically mentioned in
7 Jim Bray's deposition, was -- that exact question, I
8 believe, was asked and answered in Jim Bray's
9 deposition. I certainly wouldn't want to conflict
10 with anything Jim said.

11 And to the extent that I've collected
12 information on revenue and sales, I would have
13 collected it from Jim. So he is the much more
14 definitive source.

15 And obviously the documents themselves
16 would be the more definitive source. I can't recall
17 Jim's specific answer on that, but I think it was
18 fairly -- Canada sales are a fairly modest
19 percentage of -- of worldwide sales.

20 Q. How are Canada sales made?

21 A. We -- I mean, there's a Canadian sales team
22 responsible for selling to Canadian customers.

23 Q. And then what happens when a Canadian
24 customer purchases a FortiGate product?

25 A. What happens. It depends on what product

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1 it is. The -- and I -- again, on a revenue
2 perspective and the invoicing and the financial --
3 the financial aspects and the financial data, I'm
4 not as expert as -- as -- as Jim Bray would be.

5 On the cost side, I wouldn't be as -- as --
6 as expert as Keith Andre, who you deposed recently,
7 as well would be. So I don't understand the
8 mechanics.

9 We do have offices in Canada. Fortinet was
10 originally formed in Canada. Our largest -- we do
11 have an entity in Canada. The original entity was a
12 Canadian entity, I believe. Our largest office is
13 in Vancouver. Actually, it's a suburb of Vancouver
14 called Burnaby. That, I believe, is still
15 Fortinet's largest office. We have an office in
16 Ottawa as well, that's a fairly substantial -- one
17 of our largest offices.

18 I don't know the exact reporting -- I think
19 org charts have been collected and produced. I
20 don't know the exact reporting structure and
21 compensation structure for the sales team, but I do
22 know there is a Canadian sales team.

23 Q. Does Fortinet have an inventory
24 distribution center in Canada?

25 A. Currently -- currently, I'm not -- I'm not

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1 sure of the answer to that. Traditionally there has
2 been product distributed, and I believe that would
3 depend on which product you're talking about.
4 Certain products are manufactured in different
5 places of the world, and it depends on where it's
6 being distributed from.

7 Q. So if a Canadian customer were to purchase
8 a FortiGate product, would that be shipped from the
9 United States?

10 A. The -- all of the -- the accused products,
11 which is the ones -- I went through the list of
12 accused products to -- in preparation for the depo
13 today, all -- they're -- they're made by various
14 contract manufacturers.

15 One of the large contract manufacturers is
16 in Burnaby. Kenda Creation, I believe it's called.
17 The -- there are a selection -- a number, five to
18 ten additional manufacturers, that are all in either
19 China or Taiwan. And they will package and ship the
20 finished closed box.

21 It may be -- I believe that for sales that
22 are ultimately destined to a customer and
23 distributor that would be in Canada, that those
24 would likely hit the U.S. and then be forwarded on
25 to the customer in -- they might actually hit -- so

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1 we -- our fulfillment center is in Taiwan. I've
2 forgotten the name of the exact town in Taiwan. But
3 it -- we have a -- our main fulfillment center is in
4 Taiwan.

5 And so again, kind of depending on where
6 the contract manufacturer is. But I -- but
7 certainly the product that comes from -- which is
8 the bulk of the product that comes from the contract
9 manufacturers in China and Taiwan, it would go
10 through the Taiwan center potentially. And it might
11 pass through the U.S.

12 It's -- you've -- you've accused a lot of
13 products, so there's a lot of different -- even just
14 within that FortiGate family, there are a good
15 selection of contract manufacturers. But none are
16 in the U.S.

17 Q. So when a Canadian customer purchases an
18 accused product, it is shipped through the U.S. to
19 the customer?

20 A. Not in every case, but certainly I would
21 think in the majority of cases, it would -- from a
22 logistics perspective, I believe it would hit a
23 warehouse in the U.S. on its way.

24 Q. Is the same true for customers in South
25 America?

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1 A. I think South America is a little less
2 clear and there -- and again, there's corner cases
3 depending on the customer and the relationship and
4 the distributor, depending on the time of the
5 quarter. In last -- last-minute things, you get
6 corner cases.

7 But I believe Latin America is generally --
8 those would touch the United States. But there
9 could be a case where it's shipped directly from the
10 Taiwan center.

11 Q. Aside from Canada and Latin America, are
12 there any other countries outside of the U.S. that
13 are shipped product from the United States?

14 A. There could be corner cases. Generally,
15 no. Generally, everything would go through a
16 Jvan-An, J-V-A-N dash A-N, Jvan-An fulfillment --
17 our fulfillment center in Taiwan which, you know,
18 collects and distributes product.

19 Q. Where is the FortiOS software maintained?

20 A. That is maintained in Vancouver -- I mean
21 Burnaby, suburb of -- if I say "Vancouver," I mean
22 Burnaby.

23 It's maintained on a server, and I believe
24 there's a redundant backup also in Burnaby. So it's
25 maintained, I think, maybe in two different images

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1 in our change management, or CM, system in -- in
2 Burnaby.

3 Q. Anywhere else?

4 A. No.

5 Q. Where is the FortiOS system software
6 developed?

7 A. The -- now, when you say "FortiOS," that
8 that's sort of an overloaded ambiguous term, so I
9 want to be clear about that.

10 If you're talking about the operating --
11 well, the entire -- some -- you know, I'll answer
12 that with respect to the source code and the
13 operating system that's loaded on the accused --
14 well, that's not even -- sorry. That's not even all
15 the same on the accused products.

16 So -- okay. What do you mean by "FortiOS"?
17 If I could get you to clarify the question. Letting
18 you know that "FortiOS" means different things to
19 different people and in different contexts.

20 Q. What are the different things it can mean?

21 A. It -- I've -- it has been referred to as
22 the executable loadable image that's loaded on the
23 FortiGate family of platforms.

24 It's been FortiGate -- FortiOS has also
25 been used to refer to -- I think in engineering in

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1 Canada in particular, is -- is used to refer to the
2 source tree, the build tree that's -- that's used to
3 build the image.

4 It's been referred to as the kernel, you
5 know, the operating system, the -- the level of a
6 kernel that -- that is on the Fortinet products.

7 It's been used -- where the source tree
8 would include -- and also the source tree, which
9 would include the application-level code as well.

10 FortiOS has also been used -- I think it
11 was actually used by one of the NPS attorneys to
12 refer to -- and I've heard that used commonly,
13 Fortinet's OS, FortiOS, Fortinet's OS generically,
14 without reference to a product.

15 And we have -- Fortinet has, you know, a
16 myriad of -- a large number of distinct operating
17 systems. FortiOS has been referred to as the
18 operating system that runs on other products, such
19 as FortiMail or FortiWeb, and those have distinctly
20 different operating systems.

21 And other products. People use the term
22 loosely. So I don't want to answer sort of more
23 broadly or ambiguously.

24 Q. FortiMail and FortiWeb, do they contain a
25 software image called FortiOS?

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1 A. People have referred to their operating
2 system as running FortiOS.

3 Q. But Fortinet doesn't refer to it that way?

4 A. Well, I mean some people will. I mean, you
5 get people in marketing that don't know -- that
6 aren't -- I mean, again, it's -- if you're talking
7 to the team that's building the operating system in
8 Vancouver that's specifically loaded on FortiGates,
9 they think of themselves as the FortiOS team.

10 They will think of the FortiMail group over
11 in Ottawa. And they both use a different variant of
12 the Linux kernel, so they're both -- you know,
13 there's some commonality they're built off, but they
14 are distinct systems.

15 Q. Okay. So the internal Fortinet developers
16 think of FortiOS as the software for the FortiGate
17 systems?

18 A. That team within -- that's my impression.
19 Again, I'm not a member of that team, but I've
20 spoken to them. They -- in my understanding, they
21 think of themselves -- this is the team in Vancouver
22 working on FortiOS for FortiGates. And again, it
23 went through build -- the build tree itself creates
24 an overlapping set.

25 So even within FortiGates, the operating

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1 system by FortiGate is -- each FortiGate model is
2 different, and that's all over -- overlaid on top of
3 each other.

4 But if you group all those together, but
5 exclusively to the FortiGate system, I believe they
6 would refer to that as the overall source
7 treed [sic] -- tree.

8 The -- I don't know -- I've heard people
9 refer to the FortiMail OS or the FortiWeb or the
10 FortiCache or one of these other Fortinet products
11 running an operating system -- as they all do -- as
12 running FortiOS. I think they're using the term
13 loosely and more broadly to refer to a Fortinet
14 operating system.

15 Q. Okay. And I think before you said that --
16 that FortiOS source tree includes the
17 application-level code. Is that accurate?

18 A. If we look at the CM -- change management
19 system, which is the source code control system for
20 FortiGate's operating system, which is resident in
21 Vancouver, that source tree, which -- which has been
22 provided I think multiple times now to NPS, would
23 include what's considered kernel-level code and
24 would include what's considered application-level
25 code.

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1 Q. Is that kernel-level code and
2 application-level code available in any other form,
3 outside from buying all of FortiOS, to a customer?

4 A. I'm not sure exactly what you mean.

5 Q. Can a -- is the -- is there a smaller
6 saleable unit of the FortiOS system that would just
7 include the application layer code or the kernel
8 code?

9 A. So are you asking if we sell -- well, we
10 don't sell FortiOS, and we don't sell it in pieces.
11 There's no SKU associated with FortiOS.

12 Q. It comes with the -- the FortiGuard
13 products? I'm sorry, the FortiGate products?

14 A. So when we sell an appliance, a FortiGate
15 appliance, some appliance within the FortiGate
16 family of appliances, it would come loaded with an
17 executable image. So that image would depend on the
18 model of FortiGate that we're talking -- of the
19 family that we're talking about.

20 Q. Is there any FortiGate product sold that
21 does not come with a FortiOS image at all?

22 A. Yes.

23 Q. How so? Which one?

24 A. Well, on the -- for example, on the accused
25 list -- and again, even when you say "FortiGate,"

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1 the terms are used a little bit loosely. So is a
2 FortiWiFi a FortiGate? You know, I mean, is a
3 FortiAP a FortiGate? So -- so it gets a little
4 bit -- a little bit loose.

5 I think one of the accused products is
6 the -- I don't have the exact name designation, but
7 it's a -- one of the accused products is a -- is a
8 chassis. It's -- it's a hardware chassis. It
9 doesn't have -- it doesn't have any executable image
10 in it. Doesn't have any software.

11 Q. Doesn't have any computer parts; it's just
12 a piece of metal?

13 A. Yes.

14 Q. Okay. But I'm talking -- do you call that
15 a FortiGate product?

16 A. Yeah. I mean, that's a FortiGate -- it's a
17 FortiGate -- essentially a rack.

18 Q. Okay. It's kind of like an accessory to
19 the FortiGate product, right?

20 A. Well, you accused it as -- and so when we
21 say "the FortiGate family of products" or "the
22 accused products," I mean it's -- it's included.

23 You also accused the FortiGate 5000, and
24 there's no SKU named the FortiGate 5000, so it's
25 unclear what you're referring to. But --

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1 Q. Well, just focusing on the FortiGate
2 firewall products, are there any FortiGate firewall
3 products that are -- that do not include a FortiOS
4 image?

5 A. The chassis, I think, would be considered a
6 firewall -- it's in the family of the firewall
7 products. What do you mean by "the firewall
8 products"?

9 In fact, Fortinet's general -- you know, I
10 think we sort of strenuously, from a marketing
11 perspective, sort of avoid calling it a firewall.
12 That's sort of an old term.

13 I think when I say -- when I call it a
14 firewall, I think -- you know, I'm just -- I'm
15 speaking in more general terms about what is a
16 firewall. Most people refer to FortiGate products
17 as UTMs.

18 Q. Okay. So UTM stands for unified threat
19 management?

20 A. Right. Which is -- which I think of
21 personally as a -- sort of a -- get myself in
22 trouble with marketing, but sort of a -- you know,
23 kind of a -- you know, a glorified -- a firewall.
24 You know, it's something -- call it what it is, a
25 gateway device, a network device with added threat

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1 functionality.

2 Q. It's a better firewall?

3 A. I don't know. And so when we start getting
4 into the technical bits, we're going to overlap with
5 Jeff Crawford's testimony. And Jeff Crawford,
6 you've already deposed him. You're going to -- I
7 believe you'll be deposing Michael Xie.

8 Obviously those -- I would say the number
9 one definitive source for information about any
10 given product, any given model of Fortinet would be
11 the -- the source code, what it actually -- the
12 actual stuff that it does.

13 And then to the extent that there's people
14 giving testimony, to the extent they're able to
15 remember the hundreds of thousands of lines of code
16 that are included in the product, that -- you know,
17 it's a little hard to -- you know, no one person
18 knows it, but Jeff is pretty darn knowledgeable.

19 Q. Okay. So I'm just trying to get at some
20 foundation questions before I get to the real
21 questions.

22 A. Okay.

23 Q. So FortiGate UTM products all include a
24 copy of the FortiOS operating system; is that
25 correct?

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1 A. Well, again, I said -- you said the
2 FortiGate operating system, or do you call it
3 FortiOS?

4 Q. FortiOS -- I'll ask it again.

5 A. I've already said the FortiOS is a -- is a
6 sort of an ambiguous term. So that if we're talking
7 about the -- the source tree that we've provided to
8 you, which is -- is referred to -- has been referred
9 to, along with a bunch of other stuff, as "FortiOS,"
10 the general term of the appliance -- and also I'll
11 note you've accused things that aren't appliances as
12 well -- those would be loaded with an image that --
13 you know, that would be customized for the relevant
14 hardware or lack of hardware.

15 Q. Okay. You don't have to focus on accused
16 product for this question, just on -- on the words
17 of my question.

18 The FortiGate products that are UTM
19 appliances, so with respect to the FortiGate
20 products that are UTM appliances, do each one of
21 them contain a executable version of the FortiOS
22 source tree?

23 A. So I prefer to focus on the accused
24 products 'cause it's a very broad list, and that's
25 the list that I -- I was instructed to prepare --

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1 you know, that I understood from your request per
2 my --

3 Q. This a narrower question than that.

4 A. Oh, is it? Oh, I was thinking it was
5 broader. So I did prepare on that list of accused
6 products. There are a wide, wide range -- a very
7 large number of FortiGate appliances on that accused
8 list. Each one of those appliance -- well, there's
9 also -- you've -- you've listed FortiAPs.

10 Are you including that in the definition of
11 the FortiGate products?

12 Q. I'm asking you with regard to FortiGate UTM
13 appliances.

14 A. Okay. I'm trying to go back to that.
15 So -- so -- so excluding the FortiAPs?

16 Q. I don't know. Would you include them as
17 UTM -- UTM appliances?

18 A. Some people would.

19 Q. Do you?

20 A. That's a -- the UTM appliance -- again,
21 it's a marketing term. Are they a Fortinet product?
22 Do some people refer to them as the FortiGate? Are
23 they accused? Yes.

24 Q. Are they a branded "FortiGate"?

25 A. FortiGate, the term, the exact term, no.

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1 Q. Okay. So let's focus --

2 A. I don't think so.

3 Q. Let's focus on the products that are
4 branded "FortiGate".

5 A. Okay. So the --

6 Q. The UTM appliances that are branded
7 "FortiGate" is what I'm focusing you on.

8 My question is, with regard to the UTM
9 appliances that are branded "FortiGate," do each of
10 them contain an executable version of the source
11 tree called FortiOS?

12 A. Okay. And -- okay. Looking at -- I'm
13 going to go back, just to be precise, to the accused
14 product list, which is what I prepared for.

15 There's a selection of FortiAPs. We'll
16 exclude those. They have their own operating system
17 which is distinct from the operating system that's
18 developed for the FortiGate family and resides on
19 servers or in our change management system in
20 Vancouver.

21 Excluding chassis and other parts that
22 don't have them, but if we're asking that general
23 question across the accused products, which is
24 primarily the "Forti," represents the breadth of the
25 FortiGate family, those would be loaded with an

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1 executable image that would be generated out of that
2 change management system in Vancouver.

3 Q. And that executable image would be of the
4 FortiOS source code?

5 A. Well, I've already said FortiOS is -- has
6 been referred to as even that OS that's loaded on
7 the FortiAPs, and that's totally distinct. So then
8 it's certainly not -- they're different. And -- and
9 it's not loaded with a FortiMail operating system or
10 FortiWeb operating system.

11 So there is a specific operating system
12 that's loaded on FortiGate family, so it's very,
13 very variably built.

14 Q. What is the name of the specific operating
15 system that is loaded on the FortiGate family UTM
16 appliances?

17 A. As I've said, it has been referred to and
18 it's very commonly referred to as FortiOS. But that
19 term also ends up encompassing other operating
20 systems and other products.

21 So I'm trying to be precise and say the
22 FortiOS -- what is commonly referred to as FortiOS
23 that's -- that's in our Vancouver change management
24 system for the FortiGate products, that -- from
25 that -- and it'll be different for each -- for each

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1 different appliance, obviously, an executable image
2 can be or would be generated and loaded by the
3 contract manufacturer prior to shipping, I guess.

4 Q. And for all of the FortiGate appliances
5 that do get a FortiOS image loaded on them, do they
6 all include application-level code?

7 A. I don't know the -- I don't know the
8 definitive answer to that question, but I -- I
9 believe that in the general case, at least in the
10 vast majority -- there could be some corner case --
11 some -- there could be a corner case where it's not
12 the case.

13 I believe there was a project recently that
14 was a -- sort of a firewall-only special packet
15 filtering project. I -- I don't know if that was
16 released. I don't know what it was named. But --
17 so there could be something like that that's a
18 corner case.

19 But I think in general -- again, not being
20 engineering, not working in change management -- I'm
21 a lawyer -- that the image that's -- that's
22 generated at the change management team in Vancouver
23 would be loaded and would include what I would
24 consider a kernel and would consider stuff that I
25 would consider application-level code.

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1 Q. Okay. So that was the background. And now
2 the question is, is there any way for a customer to
3 get the kernel and the application-level code that
4 you just referenced, other than buying a FortiGuard
5 product?

6 A. There's no SKU -- I don't -- I don't -- I
7 don't think -- there's no SKU. There's no --
8 without a SKU, I don't think we can sell anything.
9 There's no SKU for -- unless you're talking about
10 virtual appliances, which you've also accused.

11 So you have virtual appliances. That's a
12 software only. Is that what you're referring to?

13 Q. No. I'm asking you is it possible for the
14 customer to buy just a smaller subsection of the --
15 of a FortiGate product and just get the kernel and
16 the application-level code without buying the rest
17 of the stuff?

18 A. I don't -- there -- I don't think there is.
19 I hate to make general statements 'cause there's --
20 there seem to always be corner cases, but I don't
21 think there's a SKU for any FortiOS or, you know,
22 software-only product other than, let's say, the VM,
23 which is intended to run, as you know, on generic
24 hardware without a -- an -- you know, a Fortinet
25 specific appliance.

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1 I don't think that -- there is no SKU that
2 we would sell -- that you would buy -- that you
3 would just purchase FortiOS separately. And I think
4 I think we've -- actually, this has been the subject
5 of some of our Rog responses, I think.

6 Q. Can you buy the -- any of the FortiGate
7 products without the FortiOS?

8 A. Well, certainly the chassis. But
9 generally, I think -- and we're talking about that
10 accused list of products, excluding the chassis,
11 excluding the things that aren't products and
12 excluding the FortiAPs, that would -- any one of
13 those products in the -- at least in the normal
14 case, absent some sort of custom request or
15 something which I have no knowledge of, but that --
16 generally that's going to be loaded with an
17 executable image out of the change management team.

18 Q. An executable image of the FortiOS system?

19 A. Out of the -- what's frequently called
20 FortiOS that runs the operating system, the
21 executable -- the entire executable image that runs
22 on the applicable FortiGate.

23 Q. And that executable image that you referred
24 to, that resides in -- in Vancouver, Canada, or a
25 city near it?

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1 A. Yeah, yes.

2 Q. And not in California?

3 A. Correct.

4 Q. And the source code for that image also
5 resides in Vancouver, Canada?

6 A. I thought that was what you just asked and
7 I said "correct" to.

8 Q. Okay. I meant the executable image, but --

9 A. So the change control management -- the
10 change is a source code control system, which is a
11 source -- a source tree, which is able to generate,
12 you know, sort of overlaid plus historically
13 overlaid versions. And from that, you can trigger a
14 build of an executable image. So it's the same
15 source tree.

16 Q. Okay.

17 A. And you wouldn't -- you would load it with
18 obviously the generated executable image.

19 Q. Thank you. So let me ask it again just --

20 A. Okay. I must have misunderstood your
21 question.

22 Q. No, I misunderstood. When I was saying
23 "thank you," I was being sincere.

24 A. Oh, okay.

25 Q. I meant thank you, you've enlightened me

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1 and I understand it better.

2 So the -- the source tree and the source
3 code for the FortiOS operating system reside
4 exclusively in Vancouver, Canada?

5 A. When you're referring to the FortiOS that
6 runs on the FortiGate appliances, yes.

7 Q. And it does not reside in northern
8 California?

9 A. I do not believe so.

10 Q. And how long has that been the case for?

11 A. As long -- many, many, many years.

12 Q. And the same is true for the executable
13 version of the FortiOS code that we've been talking
14 about, that it resides --

15 A. It's built out of that change management
16 system, so -- and that -- so change so code is
17 changing all the time. And there's -- you know,
18 there's the primary build and there are special
19 builds.

20 And so when a -- when -- and actually it --
21 it's shipped to the contract manufacturers, right.
22 So a build -- so the source code is held in the
23 change management system in Vancouver/Burnaby, and
24 when we -- and then copies of that are generated and
25 sent to China, Taiwan, or right there in Burnaby for

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1 the appliances that are built there in Burnaby, to
2 the -- to the site of the contract manufacturer that
3 then would populate that into -- you know, into the
4 appliance to be shipped to a customer.

5 Q. Does that ever occur in the U.S.?

6 A. I do not believe -- if I go through that
7 accused list of products, no, there's no single U.S.
8 contract manufacturer on any product in the entire
9 list.

10 Q. And -- and that manufacturing process never
11 occurs at your Sunnyvale headquarters?

12 A. Correct.

13 Q. Okay. And how long has that been true for?

14 A. I don't know. But a long time.

15 Q. Since you've been with Fortinet?

16 A. I mean, things change over time and
17 there -- there's always -- with each new -- products
18 come in, products go out and end of life, contracts
19 with different contract manufacturers.

20 There has been -- there may have been
21 historically a contract manufacturer or two in the
22 United States. Nothing that I can come [sic] to
23 mind, but I would hate to say never.

24 Q. I was focusing on the manufacturing at
25 Sunnyvale and at Fortinet's headquarters.

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1 A. Well, no, we wouldn't do the contract
2 manufacture for any -- for -- for any of the accused
3 products.

4 Q. Okay.

5 A. Or I don't think ever have.

6 Q. Okay. Has anyone at Fortinet ever been
7 accused of fraud?

8 MR. COOPER: I object that the question
9 calls for attorney/client-privileged communications,
10 and I instruct the witness not to answer to the
11 extent that it would reveal such communications.

12 THE WITNESS: So when you say "anyone at
13 Fortinet," any person that is employed or ever has
14 been employed by Fortinet worldwide ever had any
15 accusation of fraud?

16 MR. CUKOR: That you are aware of.

17 THE WITNESS: That I'm aware of.

18 MR. COOPER: Same objection and
19 instruction.

20 THE WITNESS: And -- and I know that this
21 is the subject of a current dispute with respect to
22 some Rog answers.

23 So you say "accused of." What -- what --
24 what do we mean? Is this in a formal capacity in a
25 legal proceeding, which helps define what we mean

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1 by, you know, an accusation of fraud, in which -- in
2 which case, as I'm sitting here, depending on sort
3 of what you mean by that, I'm not aware of anything.

4 MR. CUKOR: Q. You seem very up-to-date on
5 the discovery disputes.

6 A. Well, I mean, this is going back and forth
7 right now, and I -- I think that, you know, as you
8 know, I've been intimately involved with collecting,
9 you know, and updating duties and document requests
10 and the like.

11 So obviously to the extent that there's a
12 demand to collect data, I'm usually the point person
13 for doing that collection. So I need to know the
14 exact scope of what I'm -- of what I'm collecting.

15 Q. Over the course of the last year, what
16 would you estimate the percentage of your time you
17 spent on this litigation is?

18 A. The percent of my overall time at Fortinet
19 that's dedicated to this litigation? Is that the
20 question you're asking?

21 Q. Yes.

22 A. I -- I -- it -- I would -- that would be --
23 I would be guessing at what it would be. I mean,
24 right now it seems like a lot in the last couple
25 weeks of discovery, but there are also periods that

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1 have been relatively -- you know, that have been
2 relatively quiet or largely handled by -- by outside
3 counsel and not so much my time. It's difficult to
4 say.

5 Q. Okay. So what I wanted to know about the
6 fraud question before, to get you back to that, is
7 not whether there have been any legal proceedings
8 necessarily instituted or not, but has anyone made
9 any accusations against a Fortinet employee of fraud
10 that you are aware of?

11 MR. COOPER: Same objection; same
12 instruction.

13 THE WITNESS: And sort of -- I mean, I --
14 thinking -- thinking more broadly 'cause I -- you
15 know, I don't want to say no if -- if there's
16 something that you would -- you would think would be
17 captured under that definition.

18 I don't know of any formal allegations.
19 There was a -- there was a shareholder derivative
20 suit that was filed some time ago that I had no
21 involvement with. Those usually have -- have
22 allegations of at least -- and I don't know what the
23 allegations were there, but -- so I'm not aware
24 that -- I know that that suit was filed and was
25 resolved. I don't know what the allegations were

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1 specifically.

2 MR. CUKOR: Okay.

3 THE WITNESS: Nothing else jumps to mind.

4 I do -- I do actually participate in the
5 whistle-blower program for Fortinet. I'm on -- I'm
6 on that whistle-blower hotline.

7 I think over the eight years that I've been
8 there, there have been maybe less than five --
9 somewhere -- somewhere in the three to eight,
10 somewhere in that range, of -- of -- of complaints.

11 But those would have captured like sexual
12 harassment, you know, employee complaints, you know,
13 improper -- you know, sort of sales relationships.
14 I'm not sure that -- that would -- if you would
15 capture that under the allegations.

16 MR. CUKOR: Q. No, I appreciate the
17 completeness of your answer. Let me focus the
18 question to allegations that you are aware of
19 misappropriation or misuse of intellectual property.

20 MR. COOPER: Same objection; same
21 instruction.

22 THE WITNESS: So my -- my immediate
23 reaction is not that I'm aware of, but I'm trying to
24 think more broadly. I mean I think the -- the
25 litigation that we've been a party to are all of

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1 public record.

2 I don't think there's been -- included in
3 those allegations -- again, I didn't -- in
4 preparation for this I didn't review all of the
5 complaints. They're all publicly filed. I didn't
6 review those to see if -- I mean a lot of times
7 there's a whole lot of -- as you know, there'll be a
8 lot of and this and this and this and this.
9 Additional allegations.

10 I -- I can't say that -- that there's -- I
11 don't -- I don't think there's any -- anything
12 substantive, anything that rose to -- to the
13 attention that I'm acutely -- that I'm aware of it.

14 MR. CUKOR: Q. Okay. Are you aware of any
15 allegations of theft of trade secrets?

16 MR. COOPER: Same objection; same
17 instruction.

18 THE WITNESS: I -- I don't -- I do not
19 think so. There was a case that predated me. So in
20 the early 2000s, I think there was a case that had
21 some unfair comp elements to it, if we're thinking
22 that broadly. It's not something I was -- it was,
23 you know, resolved amicably before I joined the
24 company.

25 MR. CUKOR: Q. What was that case?

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1 A. I think it was -- it was originally brought
2 by NetScreen against Fortinet for hiring NetScreen
3 individuals.

4 Q. Do you know which individuals?

5 A. Were hired?

6 Q. (Nonverbal response.)

7 A. Okay. No. Again, the case predates me.
8 And I think there was just a number -- it's similar
9 to the case that -- a competitor case that we
10 brought against Palo Alto Networks, where there's a
11 pattern of -- a pattern of hiring which raises
12 concerns about protections of intellectual property.

13 I think that this comes within the scope of
14 what you're looking for, so I'm trying to think
15 broadly about that.

16 In -- I don't think there's been any --
17 like the Trend suit I don't think had any such
18 allegations. The countersuit by PAN, I don't --
19 Palo Alto Networks -- I don't think had any such
20 allegations. We asserted them against Palo Alto
21 Networks, and I believe we've asserted them in the
22 other case against FireEye that's currently pending.

23 But I don't think anyone, other than that
24 early suit, have made such allegations against
25 Fortinet. Not that I -- that come to mind.

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1 Q. And how was that NetScreen dispute
2 resolved.

3 A. NetScreen was purchased by -- again, this
4 is -- predates me so I don't know the circumstance
5 around it, but my understanding is that NetScreen
6 was purchased by Juniper, and that diffused some of
7 the competitive personality -- you know -- I don't
8 know. That somehow diffused the situation. It
9 was -- it was largely resolved.

10 Q. Just by the acquisition by Juniper?

11 A. I think some of the people controlling the
12 litigation changed. But again, I -- I'm
13 speculating. So I should -- probably shouldn't be
14 saying. It's before my time.

15 Q. So then as far as you know, was any payment
16 made to NetScreen to resolve that?

17 A. I think a reasonably nominal amount.

18 I think the -- I think the -- the piece
19 that I'm aware of was a duty, you know, for some
20 period of time to -- to provide education to
21 incoming employees, if they came from Juniper or
22 NetScreen, to train them on their obligations around
23 preserving the confidences of their prior employer.

24 Q. So -- but did Fortinet pay money to
25 NetScreen or Juniper in connection with resolving

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1 that dispute?

2 MR. COOPER: Same objection; same
3 instruction.

4 THE WITNESS: I -- I -- I -- I believe
5 there was some payment, but I believe it was --
6 again, that predated me, but I think it was not
7 significant.

8 MR. CUKOR: Q. Do you remember -- do you
9 have an idea what the number was?

10 A. I'd be guessing, but I would guess a
11 hundred thousand dollars.

12 Q. Why are you guessing a hundred thousand
13 dollars?

14 A. Well, because it was something -- I believe
15 it was something along those lines. So I cannot
16 guess. I cannot guess, in which case I would say
17 nothing. But I -- I mean not nominal as in you and
18 I would think was nominal. If someone asked you to
19 pay a hundred thousand dollars, that would not be
20 nominal to you.

21 But in the larger context of litigation, I
22 remember it not being that -- that significant an
23 amount.

24 Q. Okay. Is there an agreement that
25 memorializes that transaction?

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1 A. I believe there was a settlement agreement.

2 Q. Was that produced in this litigation?

3 A. I'm not -- I'm not sure that it was. I'm
4 not sure that if I remember back to looking at the
5 various document requests -- also this would -- I
6 think predates most of the document request date
7 ranges. I'm not sure that it would be -- you know,
8 we'd have to find it 'cause it's very old, but
9 certainly could be produced.

10 MR. CUKOR: I'm asking now then if you
11 could find it. And if you're able to find it, would
12 you please produce it? You can discuss it with your
13 counsel.

14 THE WITNESS: Oh, no. I mean we can.
15 Usually -- I know that in other the other
16 depositions, to the extent that there's document
17 requests that come out of it, that we ask that you
18 memorialize them separately in writing so that we
19 can track them appropriately.

20 MR. COOPER: So I'll just say, consistent
21 with the practice in previous depositions, we'll
22 take your question under advisement and ask that it
23 be communicated in writing to us so there's no
24 miscommunication about what you're asking for.

25 MR. CUKOR: Q. Has Fortinet or its

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1 employees ever been accused of copyright violation?

2 MR. COOPER: Same objection; same
3 instruction.

4 THE WITNESS: Not that I'm aware of.

5 MR. CUKOR: Q. How about license agreement
6 violations?

7 MR. COOPER: Same instruction; same
8 objection.

9 THE WITNESS: Yes.

10 MR. CUKOR: Q. Which ones?

11 A. The Trend Micro license.

12 Q. Any others?

13 A. I don't -- I don't think so. Not -- not
14 that comes to mind.

15 Q. How about in connection with the open
16 source community?

17 A. Oh, what was the original question again?

18 Q. Has Fortinet or its employees ever been
19 accused of license violations?

20 MR. COOPER: Same instruction; same
21 objection.

22 THE WITNESS: Okay. So then I neglected to
23 recall -- there was -- that predated me. There was
24 a -- an accusation that Fortinet was not in
25 compliance with the -- with the license -- and the

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1 GPL license applicable to, you know, some -- two or
2 three discrete code modules.

3 MR. CUKOR: Q. That was an accusation?

4 A. Yes.

5 Q. And who made that accusation?

6 A. It was an organization called
7 GPLviolations.org.

8 Q. And who did they make that accusation to?

9 MR. COOPER: Same objection; same
10 instruction.

11 THE WITNESS: Again, this -- this predates
12 me so I wasn't involved, so I don't know who they
13 contacted and how that -- how that played out.

14 MR. CUKOR: Q. Do you know how that issue
15 was resolved?

16 A. I believe there was a -- a -- an
17 agreed-upon settlement which required compliance
18 with the GPL license.

19 Q. So there wasn't a finding by a Court made
20 in that case?

21 A. I don't -- I don't -- I don't believe so.
22 Again, this is -- this predates me, and it was
23 resolved before I was there. I believe there was
24 a -- there's a process in the German courts -- it
25 was somewhere in Germany it was brought, where

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1 without making a finding, I think you can -- you can
2 make an accusation and get some sort of a
3 restraining order in advance of any sort of formal
4 finding.

5 But again, I'm -- this is not my area of
6 law. I've never practiced in Germany, and I wasn't
7 involved with that case. I only know about it sort
8 of anecdotally.

9 And that's another one of the things that
10 is under my area of responsibility, is open source
11 compliance, which is something that was sort of
12 actively beginning as a result of this -- you know,
13 being this -- this -- the accusation.

14 Q. Are there any open source code in FortiOS?

15 A. Yes. And I believe it has been requested
16 and disclosed to -- at least to the extent that we
17 had it available to, NPS.

18 Q. Is there open source code in the kernel
19 portion of the FortiOS operating system?

20 A. As I mentioned earlier, the -- the FortiOS
21 system is built on a very early version of the Linux
22 kernel, and the Linux kernel is comprised of a
23 number of open source licensed modules.

24 Q. And what are the consequences of that in
25 terms of maintaining the secrecy of the FortiOS

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1 kernel?

2 A. I don't understand your question.

3 Q. Does Fortinet have an obligation to
4 disclose any of the source code for the kernel --

5 A. So you're --

6 Q. -- to the public?

7 A. So you're asking me about my interpretation
8 of the obligations of the -- of the GPL license
9 or -- a variety of open source licenses?

10 Q. Well, you mentioned you were the head of
11 the open source team, so, yes.

12 A. But it's a -- it's a complicated -- it's a
13 complicated question. There's -- there's -- within
14 the -- I mean the Linux kernel is not a single
15 discrete module under a single discrete licensing
16 scheme, so it's a -- it's a -- you know, there's an
17 entire cottage industry that has sprung up around
18 understanding the licenses and complying with the
19 licenses.

20 So, yes, within Fortinet I'm charged with
21 running our annual audit and understanding the
22 various components and -- and running our compliance
23 program, which, again, that bit and the legal
24 conclusions around it and what I -- and how I
25 structure that program would be -- would be attorney

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1 work product and privileged information.

2 Q. Let me ask you a different way. Has
3 Fortinet made any portion of the FortiOS kernel
4 generally available to the public?

5 A. Our EULA, end user license agreement, which
6 has been produced, I'm sure, in various copies to
7 NPS, includes disclosure about the open source
8 obligations about the included open source.

9 And that EULA includes and I haven't looked
10 at it. It's not my -- updating the EULA is not my
11 area. Our commercial agreements is not something
12 I'm directly responsible for, but I believe it still
13 has -- and we periodically update the -- that
14 obligation.

15 And the fact that a -- you know, a user can
16 request a copy of the code that would be licensed
17 under the GPL or the LGPL.

18 Q. Has anyone ever requested that?

19 A. To date, during the -- I think I've been
20 running that system -- I mean I -- I instituted the
21 annual audits, and I've been running the open source
22 compliance program pretty much from the start.

23 I believe we've had at least one, maybe
24 two, if I include your request for the open source
25 license, so I think you went -- you didn't go

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1 through the normal channels for requesting it.

2 I think we've had one sort of normal
3 request, and that was probably back in the 2006 time
4 frame.

5 Q. And what was provided?

6 A. I believe what we provided collected and
7 provided to NPS is what we provided.

8 Q. To the other party that requested the
9 disclosure under the open source agreement?

10 A. Yes.

11 Q. Okay. In your expertise as a -- let me
12 start again.

13 In your experience as a licensor and a
14 licensee of intellectual property, does the fact
15 that an assignment of the '601 patent recites
16 consideration of one dollar relate to the value of
17 the '601 patent?

18 MR. COOPER: Caution the witness not to
19 reveal any attorney/client-privileged information.

20 THE WITNESS: And I'd ask you to clarify
21 the question. You've completely lost me.

22 MR. CUKOR: Q. Okay. Do you think hearing
23 it one more time before you --

24 A. It might.

25 Q. Okay.

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1 A. I just -- one dollar -- so one dollar's
2 mentioned where and based on my experience doing
3 what?

4 Q. Okay.

5 A. I'm just -- I -- I didn't get the question.

6 Q. I'll break it down, then.

7 Did you know that there was an assignment
8 in the assignment chain of the '601 patent that
9 recited a dollar for consideration?

10 A. I have -- this is not documents that I --
11 in documents that I've collected internally and that
12 I'm aware of internally. I've seen -- I've seen
13 internal discussions that would be privileged from
14 communications from outside counsel that I -- that
15 I'm worried about. I --

16 Q. Let me ask --

17 A. Did it -- it may have been mentioned in the
18 background section of the motion to dismiss, but I
19 can't recall. I can't recall that -- the entire
20 scope of what was in that motion to dismiss.

21 Q. Let me -- let me ask it hypothetically --
22 not hypothetically, on a general level.

23 In your experience as a licensor and a
24 licensee of intellectual property, does the fact
25 that an assignment recites one dollar as the

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1 consideration in it affect the value of that
2 intellectual property?

3 A. If I understand the question correctly --
4 affect -- I -- I'm not sure I do understand the
5 question. But if I purchase a patent for a dollar,
6 and I -- we draft an agreement memorializing that
7 purchase for a dollar, the dollar's at least
8 relevant -- I mean has something to do with the
9 value of patent, but it kind of depends.

10 I mean we also do a number of transactions
11 that involve other -- you know, that are part of a
12 larger transaction. So I'm -- I'm not sure exactly
13 what you're getting at.

14 If I buy some -- you know, if I buy
15 something for a dollar, you know presumably it's
16 worth a dollar.

17 Q. Does -- are -- are patent assignments -- do
18 patent assignments ever recite one dollar for the
19 consideration as a matter of form when the actual
20 value of the patent has nothing to do with that
21 dollar?

22 A. If I think of the patent assignments that
23 I've recorded, I don't think that any of them are
24 structured in that way. I think the value that we
25 put on the assignments -- and there have been a

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1 number of them -- actually reflect the value paid
2 and negotiated.

3 Q. So you think that the -- at least the way
4 Fortinet would handle it would be that the value
5 identified in the assignment is the value of --
6 reflective of the intellectual property that's being
7 assigned?

8 A. Again I'd -- I did go back and review -- I
9 usually ask for help from outside counsel to do that
10 'cause there's the PTO assignment, there's the
11 purchase agreement, so there's a number of different
12 agreements, some being -- some that are sort of
13 subject to disclosure and publicly filed, some that
14 are not.

15 So -- but thinking back to the
16 transactional documents that I've reviewed for this
17 deposition -- in preparation for this deposition,
18 and I looked at -- because there's a category of
19 documents where we did purchase intellectual
20 property either independently or as a piece of a
21 larger transaction, if I think about those
22 documents, in each case the consideration paid is
23 the actual negotiated consideration paid.

24 Q. So just your own personal policy as -- as
25 Todd Nelson, you would not record an assignment for

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1 a dollar when the actual amount paid was different
2 than that?

3 A. I don't record any of the assignments, so I
4 negotiate -- I'm involved with negotiating the
5 actual substantive deal, the purchase transaction,
6 the license transaction. So that's the piece of it
7 that I'm thinking of.

8 If I think you're referring to maybe
9 something -- something different, so I'm -- I'm a
10 little unclear.

11 Q. Would you sign an assignment that recited a
12 dollar for consideration when the actual purchase
13 price was much more than a dollar?

14 A. I don't -- I don't know. It would be
15 fact-specific. And I'm trying to go through my head
16 on the list of assignments that I've been involved
17 with, and I think I've comprehensively listed each
18 and every assignment that I've done.

19 And -- and prior to this, my -- you know,
20 working at Fortinet, I was working as an outside
21 counsel. I didn't sign any such documents. So that
22 what you've got represents my entire history of --
23 of -- of assignments of patent purchases, sales,
24 either alone or in -- or as part of a transaction.
25 So I think you've got my -- you've got my -- you've

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1 got the -- my entire dataset you have access to.

2 Q. Okay. Thank you. But is it your policy as
3 a Fortinet employee that you would insist that the
4 value of the -- that is recorded in the assignment
5 that you sign would be the value of the patent?

6 A. Again, we don't have such a policy. And
7 I've -- I've given you the -- every single patent
8 assignment that Fortinet's done. And I've -- I've
9 had my -- you know, I basically have been involved.
10 I probably signed all of them.

11 Again, I didn't check my signature in each
12 of those. I mean our GC could have signed them
13 instead of me or maybe our CTO or CEO.

14 But for the most part, I've been involved
15 in each and every one of those. You have every
16 single data point. So to the extent there is a
17 policy or was a policy, I think it would be
18 reflected in documents that we've produced to you.

19 Q. Okay. So is your belief that the
20 consideration that is recited in the assignments
21 that you've signed reflective of the value of the
22 intellectual property that's being assigned for
23 those assignments?

24 A. Going -- it gets complicated going through
25 each. I'd rather just step through each one and

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1 sort of answer the specific question again about
2 each one.

3 And when you talk about reflective of the
4 value, if we're talking about just a patent -- you
5 know, just -- I'm purchasing patents from you and
6 we're -- you know, it is an agreed-to price. You
7 might have -- the seller might have a different
8 value than the buyer might have. And it -- you
9 know, I'm -- I'm struggling here.

10 I'd rather just go through the specific
11 documents, and I can tell you, you know, what our
12 value -- obviously we -- if we did the transaction,
13 then, you know, I was able to get the budget to do
14 the transaction, and we -- you know, I was able to
15 justify the value relative to that, those assets.

16 Q. Could it be that the value of consideration
17 that is recited in an assignment document has no
18 bearing at all on the value of the intellectual
19 property that's being assigned?

20 A. I -- I'm not sure -- you seem to be asking
21 for an abstract question. I've given you the
22 entirety of my -- of my experience in -- with -- in
23 signing and negotiating IP -- you know, deals that
24 include IP. So you've got my entire dataset.

25 Q. I am asking you a general question. Is

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1 it --

2 A. I don't know.

3 Q. -- is it --

4 A. You have my entire dataset.

5 Q. I understand. But is it your belief that,
6 in general, companies record assignments that recite
7 consideration that bears no value at all in
8 understanding the value of the IP that's being
9 assigned?

10 A. It -- it hasn't been my practice. I
11 haven't been involved in any of those transactions,
12 so I can't really speak to what -- I would be
13 speculating as to what other companies do, other
14 lawyers do, and what you mean by "recording."

15 Q. Okay. You mentioned before that you get a
16 bonus based on -- and you used an acronym like BDO.
17 Is that --

18 A. MBO.

19 Q. MBO. What does that stand for?

20 A. Management by objectives.

21 Q. What does that mean?

22 A. I think it's a fairly common term in
23 employment these days, at least in industry in the
24 Valley here, where you have a variable bonus based
25 on a set of largely unattainable goals. I'm

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1 kidding. I mean hopefully they're attainable, but
2 it depends on your -- your boss and how about
3 reasonable they are.

4 Q. What are -- do any of your management-based
5 objectives relate to litigation?

6 A. Yes.

7 Q. What are those?

8 A. This is -- this is new, so it's -- it's not
9 something I've paid a lot -- it just was instituted.

10 But I believe that I have -- and I haven't
11 spent a lot of time thinking about it. My policy is
12 to try to do a good job, and if I earn the bonus I
13 earn the bonus. I'm not going to -- you know, I
14 just -- I'm not going to use that as a -- as a
15 guidepost for how to operate on a day-to-day basis.

16 But a small percentage, maybe it's a
17 quarter of my bonus is based on not exceeding
18 budget.

19 Q. And --

20 A. The litigation budget, sorry.

21 Q. Not exceeding the litigation budget.

22 And if you were to pay a settlement in this
23 case, would that be a part of your litigation
24 budget?

25 A. No. I think it's just -- I mean, as I

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1 understand my -- it's newly instituted, but as I
2 understand it -- we'll see in practice -- we have a
3 quarterly, we have an annual budget we project. And
4 I am tasked with managing outside counsel and
5 working with finance and -- and -- and staying on
6 track and operating within a budget.

7 MR. CUKOR: Okay. I think we need to
8 change the tape now. Let's go off the record.

9 THE VIDEOGRAPHER: We are going off the
10 record. The time is 3:01 p.m. Here marks the end
11 of videotape number 2 in the deposition of
12 Todd Nelson.

13 (Recess taken.)

14 THE VIDEOGRAPHER: We are back on the
15 record. The time is 3:19 p.m. Here marks the
16 beginning of videotape number 3 in the deposition of
17 Todd Nelson.

18 MR. CUKOR: Q. Before the break you
19 mentioned the Fortinet budget and the forecast. Is
20 there a certain amount that is budgeted for paying
21 intellectual property patent licenses to third
22 parties?

23 A. No.

24 Q. Nothing is budgeted for that?

25 A. Oh, no. Now, I think it's loaded -- a

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1 loaded question. What do you mean by "budgeting"?

2 I mean -- yeah, what do you -- what do you mean by

3 "budgeting"?

4 Q. You mentioned a budget that you have for
5 litigation.

6 A. Right. We have a -- we have a -- a budget.
7 I mean with each litigation we have outside counsel
8 retained, and maybe there's experts and additional
9 costs. I mean, so there's a budget for the ongoing
10 litigation.

11 And we look forward and try to -- you know,
12 we -- we have an obligation -- again, because, as
13 you know, we're a public reporting company. There
14 is -- we -- we project -- as part of our -- our
15 normal financial reporting process, we project, you
16 know, revenue to the best of our ability and we
17 project costs.

18 And part of costs -- I mean, the -- we're a
19 cost center, the legal department, and so we try to
20 budget out what those ongoing costs would be. I
21 don't believe -- again, I'm not involved in the
22 financial reporting aspects, but I don't believe --
23 'cause there's different aspects of that, but I
24 don't believe as part of our -- you know, our normal
25 budgeting process that I'm referring to that there's

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1 any -- there's any element of -- of an estimated or
2 guesstimated or approximated settlement.

3 Q. Okay. So there's a -- there is a document
4 that's a annual budget for Fortinet?

5 A. I don't know if it's a document. It's --
6 it's more of a process. I don't think I've ever
7 seen a document.

8 Q. Okay. There's a Fortinet budget process
9 and each year a certain amount is allocated for
10 litigation, correct?

11 A. Yes, it's broken out by litigation. So ...

12 Q. But each year there's a certain amount of
13 money that is in the budget process identified or
14 earmarked for litigation, correct?

15 A. Yeah. I'm not sure about the earmark. So
16 I mean -- and I don't know the exact timing. It
17 seems to vary each year depending on how busy we
18 are.

19 But let's say at the end of
20 October/November, as we're going into next year, we
21 would look at the various litigation matters that
22 are ongoing. You can't predict those that -- you
23 know, you don't know what might come up, but you
24 look at those that are ongoing, and we -- we project
25 out whether we -- whether we think they would run

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1 the entire year.

2 We look at this case schedule. We -- we
3 ask for a budget from our outside counsel, you know,
4 based on their experience in -- in -- in -- in
5 represent -- you know, in -- in similar cases during
6 similar life cycles, and we -- and we create a
7 budget.

8 Q. And is any part of that litigation budget
9 based on expectation of litigations that had not yet
10 been filed?

11 A. I -- I -- I don't believe that's the -- you
12 know, I don't believe so.

13 Q. So it's just based on existing litigations?

14 A. I believe that's the case.

15 Q. And is there any money identified in that
16 budget for paying third-party patent licenses?

17 A. In the litigation budget?

18 Q. No. In the budget in general.

19 A. I -- I don't believe so.

20 Q. Okay. Fortinet has sued other companies
21 for patent infringement, correct?

22 A. Patent infringement claims have been -- or
23 counterclaims have been included in various lawsuits
24 that we've been involved with.

25 Q. Is suing other companies for patent

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1 infringement sometimes a business necessity?

2 A. I'm not sure what you mean by that.

3 Q. Is it sometimes part of Fortinet's business
4 to sue other companies for infringing Fortinet's
5 patents?

6 A. To the extent I understand the question, I
7 don't -- necessity. I'm not sure what you mean,
8 but -- or are part of our regular practice. I -- I
9 would say no.

10 But we have been -- so there was a -- I
11 don't think there actually -- there were no
12 counterclaims in the Trend suit.

13 In the Palo Alto Networks suit, that was
14 a -- an unfair competition, a employee raiding, a
15 breach of contract, a -- it was a multifaceted
16 litigation which included some patent claims and
17 some patent counterclaims.

18 Q. Okay.

19 A. And I think it's a reasonably sort of -- I
20 don't know if you'd call it a necessity, but I think
21 it's -- it -- it is an occasional part of business
22 practice, a business practice. It happens.

23 Q. Does being a plaintiff in a patent action
24 in any way make Fortinet a bad company?

25 A. I'm not sure what you -- I'm not sure what

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1 you're asking. This -- this feels like -- there was
2 an earlier question that sounded similar.

3 I think I've described -- we've had -- we
4 had a trade secret case that we filed against a
5 company called Encheva. But I don't believe there
6 were any patents. That was -- we alleged that
7 they -- we actually caught them red-handed. They
8 had stolen chunks of Fortinet code and baked it into
9 a competing product. So that -- so we were -- we
10 were bringing that litigation to stop that activity.

11 Q. So they were improperly using your
12 intellectual property?

13 A. Well, they had -- they had taken -- or they
14 claimed it was a third-party contract and they were
15 unaware of it. They had taken code that they had
16 reverse-engineered or taken through higher -- and
17 that one also had employee raiding, some employer
18 hiring. And then upon investigation, code --
19 Fortinet code showed up on their device. So we
20 brought suit to -- you know, to stop that activity.

21 So I'm not sure there's any bad company. I
22 don't think there's a -- I don't -- I'm not sure I
23 would -- I would question our motives in bringing
24 that suit.

25 The other suit that we brought was against

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1 Palo Alto Networks, a competitor. And I would say
2 that's more similar, more akin to the
3 NetScreen/Juniper case. And I think those are
4 multi -- multifaceted competitor cases.

5 Q. If a third party infringed the patent
6 rights of Fortinet and refused to take a license,
7 would it be appropriate for Fortinet to sue that
8 party?

9 A. Fortinet doesn't have a licensing program.
10 We don't look for -- as a -- you know, as a -- as a
11 practice, we don't look for infringement. We -- and
12 we don't seek to demand license fees from other
13 companies.

14 Q. But you have sued other companies for
15 patent infringement, right?

16 A. We have had competitor suits that are
17 multifaceted and have had patents that were -- that
18 were in the mix of -- of, you know, alleged
19 offenses.

20 Q. Is there anything inappropriate about that?

21 A. About including those? I'm not sure -- I'm
22 not -- I'm not sure that -- it sounds like you want
23 me to comment personally on this. I -- you know, I
24 just -- I'm not sure that's really appropriate.

25 Is this within a 30(b)(6) topic? If so,

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1 could we figure out which one it is and whether I'm
2 speaking for Fortinet or just me?

3 But -- but personally I don't -- I don't
4 think I'm -- would want to offer an opinion about
5 that. I mean, we can't -- I mean -- you know.

6 Q. So I'm asking you, in whatever capacity you
7 feel comfortable answering, is there anything
8 inappropriate about Fortinet being a plaintiff in a
9 patent infringement action?

10 A. So you're asking me -- so it sounds like
11 you're asking me sort of theoretically or in the
12 abstract whether -- whether there would be
13 anything -- I mean, certainly I can envision a
14 scenario, and there certainly are scenarios that I
15 personally believe there -- that the patent
16 infringement action is -- lacks merit, and -- and
17 certainly you would attribute some negative
18 connotation to prosecuting -- improperly prosecuting
19 that action.

20 Q. And has Fortinet ever been involved in one
21 of those?

22 A. I -- I don't believe so.

23 Q. Okay. Does Fortinet have a policy or a
24 business strategy about settling cases with
25 companies like Network Protection Sciences?

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1 MR. COOPER: I object that the question
2 calls for attorney/client-privileged communications
3 and instruct the witness not to answer to the extent
4 that it would reveal such communications.

5 THE WITNESS: I think to the extent that
6 there is a policy about settling, I -- I think that
7 would be privileged. I think, once again, you're
8 sort of asking for the -- you know, what we're
9 thinking about in -- in reaching -- you know, in
10 reaching a settlement.

11 MR. CUKOR: Q. I'm asking for the business
12 policy. And I'm saying does Fortinet have a
13 business policy about not settling with
14 nonpracticing entities?

15 MR. COOPER: Same objection; same
16 instruction.

17 THE WITNESS: There's -- certainly there's
18 no published policy that exists describing settling
19 or not settling any patent lawsuit or a patent
20 lawsuit with a nonpracticing entity.

21 MR. CUKOR: Q. Is there any informal
22 policy?

23 MR. COOPER: Same objection; same
24 instruction.

25 THE WITNESS: There is no such policy that

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1 I'm aware of.

2 MR. CUKOR: Q. Does Fortinet have any
3 formal or informal business policy about licensing
4 patents from nonpracticing entities?

5 MR. COOPER: Same objection; same
6 instruction.

7 THE WITNESS: Again, there's no published
8 policy, there's no informal policy. Every business
9 situation would be -- and I think is appropriately
10 dealt with on a case-by-case basis.

11 And the -- the consideration of those cases
12 would be essentially a largely privileged discussion
13 between a client and the attorneys looking at the --
14 the -- the situation.

15 MR. CUKOR: Q. So does Fortinet have any
16 business policy at all that relates to nonpracticing
17 entities?

18 MR. COOPER: Same objection; same
19 instruction.

20 THE WITNESS: So you're saying a Fortinet
21 policy, a company policy about litigations.

22 MR. CUKOR: Q. I don't know if it's a --
23 it's a company policy or a policy of the officers or
24 the executives, but does -- does that trickle down
25 to any kind of business policy that's implemented by

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1 Fortinet that relates to nonpracticing entities?

2 MR. COOPER: Same objection; same
3 instruction.

4 THE WITNESS: I don't -- I can't speak for
5 each of the directors or officers of the company as
6 to what their feelings are about settling cases or
7 taking licenses with nonpracticing entities.

8 I am -- and to the extent that there have
9 been conversations about taking licenses or
10 defending a litigation against a nonpracticing
11 entity, I think that would be in the privileged
12 context.

13 In the nonprivileged context, I think
14 during -- during settlement negotiations in fact
15 with NPS, I think we may have -- we may have said
16 that our CEO is -- is upset by the practices of
17 nonpracticing entities, and he -- our CEO, Ken Xie,
18 is -- is dubious of the merits of a number of those
19 cases and those types of case, and he is also very
20 budget conscious.

21 So I -- I don't know if that rises to the
22 level of this. But to the extent that it's
23 something that's not privileged -- it's probably
24 something that we may have mentioned to you in
25 passing, just about some general personality

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1 qualities of -- of -- you know, of our CEO.

2 So you would know it as well as I do 'cause
3 we would have expressed it to you. If I have -- if
4 we haven't, then -- I think -- and I think we may
5 have mentioned that. But if not, then -- then I'm
6 misremembering.

7 MR. CUKOR: Q. So is it your understanding
8 that it's Ken Xie's policy not to settle with
9 nonpracticing entities?

10 MR. COOPER: Same objection; same
11 instruction.

12 THE WITNESS: No, that -- that's not what
13 I'm saying. I -- I think I mentioned he -- Ken is a
14 person, and he has a number of attributes. He is
15 very -- budget conscious being one of the very
16 prominent attributes of -- of Mr. Xie.

17 I don't think, you know, the sum of the
18 personality traits necessarily rises to the level of
19 a policy. It's just he has a personality. He
20 doesn't like the non -- the activities of the
21 nonpracticing entities, and he is budget-minded. I
22 think that's, you know, as far as I can go.

23 MR. CUKOR: Q. When you say he's
24 budget-minded, how does that relate to Fortinet's
25 decision to take or not take a license from a

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1 nonpracticing entity?

2 MR. COOPER: Same objection; same
3 instruction.

4 THE WITNESS: Well, in this case, we've had
5 settlement negotiations, so trying to avoid the
6 privileged communications. But the negotiations
7 that we have had with you, you've made demands.
8 They're -- they're, you know, for a lot of money.
9 And that would -- that would be -- conflict with a
10 budget-minded CEO and what he would necessarily --
11 what he would be likely to agree to.

12 MR. CUKOR: Q. But how does that
13 budget-mindedness relate specifically to the fact
14 that the plaintiff in this case is a nonpracticing
15 entity?

16 MR. COOPER: Same objection; same
17 instruction.

18 THE WITNESS: I think I've -- I've
19 mentioned that, you know, more than -- on top of
20 budget-mindedness, you know, our CEO -- and many
21 technology CEOs, you know, in my under- -- you know,
22 industry exposure, look -- are unhappy about the
23 activities of the nonpracticing entities.

24 So does that rise to the level of a policy?

25 No. But I'm just -- I'm trying to -- you know, I

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1 think these are things that we've expressed during
2 settlement negotiations, is that -- that there are
3 challenges our management -- there are challenges,
4 regardless of what we think and regardless of what
5 the privileged communications, which I'm -- you
6 know, which I'm trying very carefully to avoid --
7 but I -- but, again, I think you have this data, so
8 I'm not -- I'm not trying to give you anything more
9 than what we've already expressed to you, I think,
10 fairly clearly during the settlement negotiations.

11 MR. CUKOR: Q. So Fortinet does not like
12 being sued by nonpracticing entities?

13 MR. COOPER: Same objection; same
14 instruction.

15 THE WITNESS: I think that would be a fair
16 statement.

17 MR. CUKOR: Q. Does Fortinet dislike it
18 more than being sued by a practicing entity?

19 MR. COOPER: Same objection; same
20 instruction.

21 THE WITNESS: I'm not sure how this is
22 relevant or -- and I notice it has nothing to do
23 with our topic, our notice -- our 30(b)(6) topics.
24 Or if you can alert me to where it relates to it,
25 I -- that would be helpful.

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1 But -- so we're -- we're digressing into a
2 general question and answer about nonpracticing
3 entities.

4 I -- Fortinet does not like being sued by
5 nonpracticing entities. I don't think Fortinet, as
6 a company, likes to be sued by competitors and tries
7 to get along with competitors and to compete in the
8 marketplace based on qualities of products.

9 MR. CUKOR: Q. Would Fortinet sell any of
10 its patents to a nonpracticing entity?

11 A. Fortinet has -- I've disclosed all the
12 patent sales that we've done. So if we want to
13 ask -- maybe we should direct focus on each specific
14 patent sale.

15 MR. CUKOR: I'm going to ask Ms. Moose to
16 reread the question and you see if you can answer
17 it.

18 (Record read as follows:

19 QUESTION: Would Fortinet sell any of
20 its patents to a nonpracticing entity?)

21 THE WITNESS: It -- it depends on how you
22 define a "nonpracticing entity." So since you don't
23 want to go through specific agreements, let me try
24 to remember them.

25 We -- we made a patent -- two different

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1 patent sales to Cisco. And I don't think they would
2 qualify as a nonpracticing entity.

3 We made a patent sale to -- through an
4 intermed- -- intermediary -- intermediate entity to
5 Google, and I don't think they would be considered a
6 nonpracticing entity.

7 We did a -- sort of a strange hybrid
8 transaction with a company called WhiteCell, but
9 that one's a little bit -- definitely there was -- a
10 very unique situation there. They were a practicing
11 entity, and that was in the context of potentially
12 buying their assets. I don't -- they had very
13 limited operations at the time that we did the
14 transaction.

15 And then we -- and subsequently sold a -- a
16 small group of applications, not patents, which was
17 following up on that. It was following up on that
18 hybrid trade transaction. And that was to Colorado
19 Remediation.

20 And that -- ultimately those -- I believe
21 there was an intention for that to be a practicing
22 entity from that core WhiteCell group, but I think
23 that ultimately those -- not the patents -- not the
24 applications that we transferred, but one of those
25 patents that we -- one of those patents that we

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1 traded was asserted in two different litigations, I
2 believe.

3 So that one might be categorized as -- you
4 might look at that as a sale to -- it wasn't a sale
5 to an active practicing entity, but it ultimately
6 ended up resulting in some litigation.

7 MR. CUKOR: Q. So Fortinet sold a patent
8 to a nonpracticing entity and that nonpracticing
9 entity sued a third party on that patent?

10 A. No.

11 Q. Okay. What was -- I thought that's what
12 you just described.

13 A. No. It was -- it was much more complicated
14 than that. We traded two patents that we had
15 acquired -- it was a complex set of transactions.
16 There was a company that was a practicing company in
17 the white listing space.

18 They -- they offered to sell us the
19 entirety of the business, patents, including the
20 assets. I was -- I was interested in those assets.
21 They were still an operating company at that time.

22 Subsequently, they ended up motivated to --
23 to do that transaction, and we -- we paid cash plus
24 one or two -- I can't recall, one or two patents we
25 traded, sort of did -- traded that transaction to

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1 them.

2 I think they then were still a practicing
3 entity and a group of engineers. I think they
4 transferred those patents to another entity, which
5 sometime later, a year or so later, I don't remember
6 the exact time frame, I'd have to look at the
7 agreements, they traded -- or not traded, but
8 transferred those patents to another entity which
9 then sued two companies.

10 Q. And was that entity that they transferred
11 the patents to wholly-owned by them?

12 A. No, I think it was unrelated to them.

13 Q. Unrelated to them. And that was Colorado
14 Remediation?

15 A. That was Colorado Remediation.

16 Q. Which party was Colorado Remediation, the
17 one that received the patents, that did the suing?

18 A. Yes.

19 Q. Okay. So Fortinet never transferred
20 patents to Colorado Remediation?

21 A. They asked us to transfer a -- a couple of
22 pending applications to them, which we -- which we
23 agreed to do.

24 Q. You sold them?

25 A. Yes.

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1 Q. And at that time, Colorado Remediation was
2 a nonpracticing entity?

3 A. That was not my understanding at the time.

4 Q. Did you understand that Colorado
5 Remediation would be bringing suit on behalf of the
6 intellectual property that it was purchasing from
7 Fortinet?

8 A. No, it wasn't our understanding at the
9 time. They -- they -- I believe some of the
10 principals who were operating -- who had the
11 operating company were involved. I can't -- I don't
12 know their exact involvement.

13 My understanding, there was some intent to,
14 you know, operate a business in that space related
15 to the patents that they had received from
16 WhiteCell.

17 And -- but there was certainly a
18 possibility, which was baked into the agreement,
19 that they could fail, they could sell the patents,
20 they could license the patents. And that was that
21 was -- those provisions were included in that short
22 agreement.

23 Q. And in that agreement, if Colorado
24 Remediation did bring a lawsuit against a third
25 party and recovered revenue as a result of that,

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1 would Fortinet be entitled to a share of that?

2 A. It was structured as a sale, I believe, for
3 [REDACTED]. But if they -- but if they did -- I --
4 I -- I'd have to look at the agreement. I'm just --
5 from memory, it was structured as a sale for
6 [REDACTED].

7 But there was a -- there was a -- if they
8 failed to pay us, the patents would come back. Or
9 if they licensed them as part of -- 'cause they were
10 somewhat up in the air on their business practice
11 and still hadn't received funding, that they
12 could -- they could send a share back of the
13 proceeds.

14 Q. So Fortinet did not have a problem selling
15 intellectual property to a nonpracticing entity?

16 A. I'm not -- Fortinet generally -- and I'm
17 not sure that it rises to the level of a policy, but
18 Fortinet has been, you know, quite hesitant to --
19 you know, to enter into a transaction with a
20 nonpracticing entity.

21 Q. But it did in the Colorado Remediation
22 case?

23 A. That was, as I've described, a little bit
24 of a complicated scenario, where we were trying to
25 purchase some assets from a practicing entity and

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1 traded some patents and then later downstream were
2 approached to -- you know, to sell some outstanding,
3 unrelated applications. So a very discrete set
4 of -- of applications, not issued patents. So it
5 was a little bit of a special case.

6 Q. In that special case, Fortinet specifically
7 reserved the right to share in the rewards of any
8 litigation that that nonpracticing entity
9 instituted?

10 A. The --

11 MR. COOPER: Same objection; same
12 instruction.

13 THE WITNESS: Well, just -- and again, I'm
14 doing this without the benefit -- it would be much
15 years if we put the agreement -- it's a short
16 agreement -- in front of us, and I don't think a lot
17 of time was spent on it. That was drafted by the
18 entity. And they -- it was drafted as a purchase
19 for 200,000, but they -- we were trying to
20 accommodate them. They didn't have the money to pay
21 for it.

22 It wasn't clear that they would get it. If
23 they did, it would be just simply a sale. The -- or
24 it would be returned. And I think those were
25 protective provisions baked in. To say that if you

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1 do end up selling these, you know -- you need to
2 pay, you need to pay. You can't sell the patents
3 without paying us. So there's a little bit of a
4 complicated issue.

5 I mean, I will say we have had offers from
6 nonpracticing entities for patents, and we have --
7 we have turned them down.

8 MR. CUKOR: Q. Which nonpracticing entity
9 made you an offer for a patent?

10 MR. COOPER: Same objection; same
11 instruction.

12 THE WITNESS: I've forgotten the name of
13 the -- MOSAID. It was through a broker. I believe
14 MOSAID made one or more offers on some patents.

15 And there was a broker representing an
16 unnamed nonpracticing entity that -- it was --
17 didn't make a formal offer but asked -- but -- but
18 had an indication of interest that exceeded the --
19 that they said exceeded what was paid -- what was
20 being offered by Google. And we elected to sell to
21 Google for less.

22 MR. CUKOR: Q. But they didn't make an
23 offer?

24 A. It was a -- it was -- it was an informal.

25 Q. Okay.

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1 A. We believe an offer in this range, which is
2 more than what you're -- you know, you can do with
3 Google -- we believe we can get that.

4 Q. And in the other situation, you did receive
5 a formal offer from a nonpracticing entity?

6 A. It wasn't in writing. It was through a
7 broker. But I -- two different offers.

8 Q. And how much were they for?

9 A. Oh, I -- I can't recall the specific
10 amount. This is -- this is two or three years ago.

11 Q. Was it a lot of money or a little bit of
12 money?

13 A. Again, I'm -- I'm guessing somewhat. I
14 think both offers -- one might have been slightly
15 less than a million. One might have been slightly
16 more. Or maybe both were more than a million, but,
17 you know, a million-two and a million-four,
18 somewhere in that range. Between 800,000 and a
19 million-four or -five would be my best
20 recollection -- recollection as to what they were.

21 Q. And for which patents?

22 A. It -- I -- I don't recall that -- the
23 numbers right off the top of my head.

24 Q. What did they cover, which technology?

25 MR. COOPER: Same objection; same

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1 instruction.

2 THE WITNESS: It was routing -- routing --
3 general -- I mean generally if I -- again, I don't
4 recall the specific patents, but I believe it was
5 routing and -- and provisioning of routers. I
6 believe that those were at least -- there was some
7 overlap with the patents that were sold to Google.

8 MR. CUKOR: Q. How much were the patents
9 sold to Google for?

10 A. That -- that's [REDACTED]
11 [REDACTED] and I can't remember right
12 off the top of my head. If we -- I mean, if you've
13 got the agreement --

14 Q. We'll go through the agreement. It's more
15 than [REDACTED] dollars, though, right?

16 A. It was. It was. I can't recall -- it was
17 more than [REDACTED], I think.

18 Q. So the offer from the nonpracticing entity
19 was less than the offer that you received from
20 Google?

21 A. That's correct.

22 Q. Okay.

23 A. I don't -- I don't remember what it was,
24 but it was less.

25 Q. Fortinet is a Delaware corporation,

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1 correct?

2 A. I believe that's the case, yes.

3 Q. Does it have offices there?

4 A. I don't -- not that I'm aware of, but it
5 might. A small sales office, at most, if there's
6 anything.

7 Q. Does it have any employees there?

8 A. I don't think so, but we -- we could have a
9 salesperson -- we end up with salespeople that live
10 and maybe work from home in various places. So it's
11 not totally obvious to me.

12 Q. Does Fortinet own any real property in
13 Delaware?

14 A. Not that I'm aware of.

15 Q. Does it own any desks in Delaware?

16 A. Not that I'm aware of.

17 Q. Any filing cabinets?

18 A. No, I don't -- I don't think we have an
19 office in Delaware. I mean, we might, but I -- I
20 just don't know.

21 Q. Any chairs?

22 A. Again, I -- I'm answering a question --
23 I've said I don't know about our offices. I -- I
24 would be -- I'd be surprised if there isn't
25 something in Delaware, but it's -- it's not going to

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1 be a big deal. But there could be a sales office.

2 I just don't know.

3 We have a number of East Coast offices, so
4 I don't want to say we don't have -- we don't have
5 when indeed we do have. I just don't know.

6 Q. Does the fact that Fortinet does not have a
7 Delaware office make its Delaware incorporation a
8 sham?

9 A. Delaware is a very common jurisdiction for
10 incorporating copies, if not the most common
11 jurisdiction for incorporating companies. So I'm
12 not understand -- I'm not sure that I understand the
13 question.

14 Q. Well, your headquarters is in California,
15 right?

16 A. The -- yeah, technically our headquarters
17 is in California.

18 Q. Cisco is a competitor of yours?

19 A. I'm sorry, I was still speaking.

20 Q. I'm sorry.

21 A. So I was saying -- on my last -- I said --
22 I think our largest office, as I've said, was in
23 Vancouver. I mean, we have a number of offices all
24 around the world, so I'm -- I'm -- now I've lost the
25 question. I'm sorry.

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1 Q. I asked you if your headquarters are in
2 California.

3 A. Okay. Yes, depending what you mean by
4 "headquarters." I think we advertise our
5 headquarters. That's where our CEO and CTO
6 currently sit.

7 Q. Okay. And Cisco is a competitor of yours,
8 right?

9 A. Cisco competes in the security space. They
10 have a broader market presence than we do.

11 Q. And they also headquartered in California,
12 correct?

13 A. I don't know technically. I know where
14 Cisco's buildings are here, but I -- I don't know
15 whether that is technically their -- whether they
16 technically consider that their headquarters.
17 But -- I may have seen that in public filings.

18 Q. They are -- and Cisco is incorporated in
19 California, correct?

20 A. I don't know that.

21 Q. So let me ask again, does the fact that
22 Fortinet does not have an office in Delaware make
23 its Delaware incorporation a sham?

24 A. No. It's -- to me what you're -- as I said
25 before, Delaware's an extreme -- I think it's the

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1 most common jurisdiction for incorporating companies
2 that exists. And there's a host of reasons for
3 that.

4 I'm actually surprised that Cisco is a
5 California corporation. My expectation, if I was
6 guessing, would be that they were a Delaware
7 corporation.

8 Q. Is one of the reasons that Fortinet is
9 incorporated in Delaware tax reasons?

10 A. I think -- I mean there's a host of reasons
11 that companies incorporate in Delaware. That --
12 that was before my time, so I wasn't involved with
13 the decision.

14 And I believe you. You know, I don't know
15 the serious of events. The original incorporation
16 might have been in Vancouver, Canada. I think the
17 earliest entity, it wasn't called Fortinet at the
18 time. It was a Vancouver entity.

19 Q. So why is Fortinet incorporated in Delaware
20 if it has no employees or offices there?

21 A. I've said I don't know what our presence in
22 Delaware looks like. It's -- it's not -- we have --
23 we have offices and employees all over the world, in
24 places that I -- I'm always highly surprised about.

25 Q. Why is Fortinet incorporated in Delaware if

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1 there are no offices or employees of Fortinet that
2 you are aware of?

3 A. What I've said is I'm not aware of the -- I
4 know our major offices, but I don't know the -- the
5 I don't know the full extent of our offices. We
6 have -- we have many offices.

7 I've given you the major offices. I've
8 also told you that Delaware is a very, very
9 common -- the most common, to my knowledge, place to
10 incorporate a U.S. corporation.

11 Q. So there's no major Fortinet office in
12 Delaware, correct?

13 A. Not -- I mean not that I'm aware of.

14 Q. Okay. And there's no major employee
15 presence of Fortinet in Delaware, correct?

16 A. I -- I just don't know -- and I don't know
17 what you mean by -- by "major." So -- I mean, we
18 have a fairly significant presence back East. We
19 have a -- and I don't know the exact location.

20 I know we have an office in D.C. I think
21 we're -- or Virginia. I just -- again, I don't --
22 it's not -- I'm not in HR. I don't map out our
23 offices. And in my -- to the extent I have
24 knowledge, it's -- it's from back when I was GC in
25 the 2005/2006 time frame.

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1 Q. What are the reasons Fortinet is
2 incorporated in Delaware?

3 A. Again, that predates my tenure at Fortinet,
4 so I -- I don't know the reasoning behind the
5 decision to incorporate there. I general -- I've
6 taken corporate law, and I gen- -- I understand some
7 of the reasons that companies generally incorporate
8 in Delaware.

9 Q. What are those?

10 A. Law school was a long time ago, but sort of
11 the -- the stability of the -- of the -- the
12 corporate regulatory scheme in Delaware and --
13 and -- basically the -- the -- I think they're
14 primarily focused around the -- you know, the stable
15 practice of law in Delaware.

16 Q. Has to do with the legal system?

17 A. I -- again, we're getting this -- I don't
18 recall this off the 30(b)(6) topic, and I graduated
19 in '97, so -- I took corporate law a long time ago.
20 I -- I know I've studied this, as to why -- there's
21 a -- there's a why. And I know I've studied it, but
22 I can't remember the exact reasons.

23 And I -- and I certainly didn't -- didn't
24 participate in the incorporation.

25 Q. So you don't know why Fortinet is

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1 incorporated in Delaware?

2 A. It -- it's not -- it predated me, as I've
3 said. It doesn't surprise me because it's so darn
4 common, and I haven't had -- I don't have anything
5 to do with the -- the establishment of corporate
6 entities for Fortinet since I was GC, which I
7 stopped being in the 2006 time frame. So it's been
8 quite some time. I'm really speaking out of turn.

9 Q. It's okay. I just want to make sure I
10 understand your answer. Your answer is that you
11 don't know why Fortinet is incorporated in Delaware?

12 A. I am not the right person to ask that
13 question of, is what I --

14 Q. I think you are the right person to ask do
15 you know why --

16 A. No.

17 Q. -- Fortinet is incorporated in Delaware?

18 A. Can we -- can we look at the 30(b)(6)
19 topics that I was put up for to speak today?

20 Q. We will do that, but I'm just --

21 A. That would -- that would help me, 'cause I
22 did prepare diligently for the 30(b)(6) that I was
23 put up. I have --

24 Q. You will have an opportunity to answer
25 those.

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1 A. But I don't think that our -- the location
2 of our subsidiaries and -- and the establishment of
3 our subsidiaries and why -- 'cause they're -- why
4 those were established in certain jurisdictions, I
5 don't recall that as being part of the topics, so I
6 must have missed that.

7 Q. No. I'm asking you just a personal
8 question.

9 Do you know why Fortinet is incorporated --

10 A. And I've --

11 Q. -- in Delaware?

12 A. And I've told you that I started at
13 Fortinet in June of 2005.

14 Q. Does that mean you know or you don't know?

15 A. What I'm saying is it predates my tenure at
16 Fortinet.

17 Q. So you don't know?

18 A. I have no reason to know.

19 Q. Okay. Are you familiar with the
20 FortiCarrier product?

21 A. I have heard the name.

22 Q. And are they FortiGate products?

23 A. I do not -- I do not know -- again, the
24 FortiGate products -- I don't -- I don't know.
25 Those are marketing names.

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1 Q. Are the FortiCarrier products loaded with
2 an image of the FortiOS operating system?

3 A. I believe the FortiCarrier products are a
4 variant of the FortiGate products. I'm not a
5 hundred percent certain, but I believe they are.
6 And as such, they would be loaded with the operating
7 system that we spoke about earlier, which has -- you
8 know, has been referred to as FortiOS and would be
9 built out of the CM system in Vancouver.

10 Q. I think you mentioned FortiAP products
11 before. Did you?

12 A. Yes.

13 Q. What are the FortiAP products?

14 A. They're, I think, the first three or four
15 products on the list of accused products that I
16 was -- that's an Exhibit B to the infringement
17 contention served by NPS.

18 Q. Okay. But what are they; what kind of
19 products are they?

20 A. My understanding of the -- is that the
21 FortiAP products are a wireless product. And I
22 believe that you guys have deposed Koroush Saraf --
23 I've forgotten his last name -- previously in this
24 litigation, and he is the product manager for the
25 FortiAP and FortiWiFi products.

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1 Q. Are they firewall products?

2 A. The FortiAP I do not believe you would
3 refer to as a firewall.

4 Q. So the FortiAP would not contain an image
5 of the FortiOS operating system that we discussed
6 previously?

7 A. No, the -- it would not contain -- the
8 FortiAP product would -- it does run, I believe, a
9 Linux-based operating system, but obviously it
10 has -- it is a device. There may be a virtual
11 version -- virtual version. I'm not sure. I don't
12 think so.

13 It is an appliance, and it necessarily has
14 an operating system. But it is distinct from the
15 FortiOS -- what's referred to as the FortiOS
16 operating system that runs on the FortiGate that's
17 built out of our contract management -- our change
18 management system in Vancouver.

19 Q. Okay. And is it the case that the FortiAP
20 product does not contain application-level
21 functionality?

22 A. I don't -- I don't know the FortiAP product
23 enough to answer that question.

24 Q. Okay. Do you know a product called the
25 SG5020?

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1 A. Is that it, just SG?

2 Q. I think so.

3 A. No "FortiGate" or anything else in front of
4 it, just SG5 ...

5 Q. 5020.

6 A. No, I don't know that -- that product. Was
7 that on the accused product list?

8 Q. I can't answer that. I don't know.

9 A. It's not -- I don't recall that. I mean,
10 I've gone through the entire accused product list
11 and mapped that out. I do not recall -- I don't
12 recall that -- that individualized product
13 designation.

14 There are a lot of -- of FortiGate blah,
15 blah, blah, blah, blah, you know, lots and lots of
16 numbers and digits and -- you know, and -- and
17 characters and stuff, but that -- that doesn't --
18 it's a long list of products that are the accused
19 products, and I -- and I -- that one doesn't jump
20 out at me.

21 Q. Aside from the FortiAP product and the
22 chassis product that you mentioned earlier, are
23 there any other products on the accused product list
24 that are not UTM firewalls?

25 A. I don't -- I don't know. It's not

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1 something -- I -- what I researched was the list of
2 products and where they were manufactured for
3 overseas sales, and so I was drilling into contract
4 manufacturers and locations and the like.

5 I have some general understanding about
6 the -- you know, I understand where the source tree
7 resides in Vancouver. And I understand the general
8 application of that onto the specific FortiGate
9 submodels, family submodels.

10 But comprehensively going through that
11 list, other than the really obvious examples, such
12 as the chassis and the FortiAPs, I didn't -- I
13 didn't research that question in preparation for
14 today.

15 Q. And nothing else jumped out at you?

16 A. I think there was a nonproduct, the 5000
17 series, which is not a SKU. There was the chassis.
18 And the -- and then there were the APs, and then I
19 think there were some virtual appliances which are,
20 again, you know, a little bit different since they
21 don't -- aren't -- that obviously isn't an image
22 loaded on -- that isn't an image that's loaded on an
23 appliance.

24 Q. Where are -- where are those virtual
25 appliances, where do they reside?

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1 A. In -- in Vancouver.

2 Q. So they're -- they're on a server in
3 Vancouver?

4 A. Yeah, yes.

5 Q. So is it -- customers can buy access to
6 that virtual appliance, is that what -- how it's
7 sold?

8 A. No. I believe it's sold as a software
9 module. Again, I don't know the specific details,
10 but I believe it's sold as a software module.

11 Q. Like a -- like a disk?

12 A. I -- I believe it may be shipped as a disk.

13 Q. Which products are those?

14 A. The virtual products?

15 Q. Correct.

16 A. I -- I would need to -- I'm -- I'm not an
17 expert in our -- in our -- our price list. I mean,
18 I could look and try to guess.

19 Q. Do you know the name of the product,
20 though?

21 A. It probably has a VM in the naming
22 convention.

23 Q. Okay.

24 All right. You've been waiting all day.

25 What 30(b)(6) topics are you prepared to talk about?

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1 A. I believe I've been designated on four or
2 five topics or portions of topics. But at the same
3 time, I think they're somewhat overlapping and
4 duplicative with prior deponents. And that -- so --
5 so a part of those already may have been covered.

6 Q. So which topics do you think you've been
7 designated on?

8 A. I don't have the list in front of me. I
9 think there were two different deposition notices
10 and I think --

11 MR. COOPER: I can help with the numbers if
12 you'd like.

13 MR. CUKOR: No. Please don't talk during
14 my deposition.

15 Q. So you don't -- you can't tell me which
16 ones?

17 A. I've been shown two different exhibits. I
18 don't know the numbers right off the top of my head,
19 but if you show me the list of topics, I can likely
20 identify those.

21 MR. CUKOR: Okay. I will mark -- I'll ask
22 the court reporter to mark as Exhibit 168 the first
23 Rule 30(b)(6) deposition notice to Fortinet.

24 (Plaintiff's Exhibit 168
25 marked for identification.)

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1 MR. CUKOR: And as Exhibit 169 the second
2 Rule 30(b)(6) deposition notice to defendant
3 Fortinet.

4 And when she's done that, she'll give them
5 to you.

6 (Plaintiff's Exhibit 169
7 marked for identification.)

8 THE WITNESS: So on this first deposition
9 notice marked Exhibit 168, on page 3, topics --
10 topic 1, identify -- identification, collection and
11 production of documents and things by Fortinet in
12 this case. I believe I've been designated on that
13 topic, and I'm prepared on that topic.

14 And then topic number 5, all licenses
15 identified in response to NPS's Interrogatory No. 8,
16 I believe I've been designated and on that topic and
17 I have prepared on that topic.

18 And topic No. 8, the factual basis for
19 Fortinet's Affirmative Defenses 4, 5 and 6, docket
20 number 37. I believe I was identified on that
21 topic. However, I have not -- I believe that the
22 topic is inappropriate and did not prepare on that
23 topic.

24 MR. COOPER: And I'll take this time to
25 object to topic No. 8 as in violation of paragraph

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1 23 of Judge Alsup's supplemental order to order
2 setting initial case management conference in civil
3 cases before Judge William.

4 Also, in particular, the paragraph states
5 select portions as follows:

6 "With respect to depositions under
7 Federal Rule of Civil Procedure 30(b)(6),
8 the fundamental purpose is to allow a party
9 to notice a deposition by subject matter,
10 thereby requiring the respondent to
11 designate and to produce one or more
12 organization witnesses knowledgeable on a
13 designated topic, a useful procedure when
14 the roles of percipient witnesses
15 controlled by an adverse party are unknown.
16 In some cases, however, counsel routinely
17 appear to notice 30(b)(6) depositions on
18 numerous and wide-ranging topics, including
19 even the basis for contentions made by
20 adverse parties. To obviate" -- "to
21 obviate disputes and to give guidance,
22 these guidelines will be observed. In
23 framing the subjects, it is normally
24 improper to ask for Rule 30(b)(6) deponents
25 to testify concerning the entire basis of a

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1 claim or defense, and the notice should be
2 directed at discovering percipient facts in
3 possession of the adverse party, not in
4 forcing a supposed fact witness to appear
5 and defend the entire thesis of a claim or
6 defense. If a notice includes an overbroad
7 topic, the overbroad topic shall be
8 unenforceable and may not later be replaced
9 with a proper topic."

10 THE WITNESS: So moving on to the second --

11 MR. CUKOR: Q. So, Mr. Nelson, you have
12 not prepared to give the factual basis for the
13 affirmative defenses that are identified in topic 8?

14 A. I have not fully prepared, as -- as -- you
15 know, I tried to diligently tried to prepare on the
16 other topics. That one I have some limited
17 knowledge. But no, I did not prepare.

18 Q. You prepared a little bit but not as much
19 as the other ones?

20 A. I have some very limited sort of
21 understanding, but I didn't do what I normally would
22 do in a 30(b)(6) deposition preparation, which is
23 study the topic, interview various people with
24 knowledge, reflect on the knowledge that I have,
25 collect -- you know, collect and review materials

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1 sufficient to be able to -- to testify competently,
2 at least as competently as -- as sort of anyone else
3 at Fortinet.

4 Q. Okay.

5 A. No, I did not do that on that topic.

6 Did -- did you want me to further identify
7 the other ...

8 Q. Yes, please.

9 A. So then on Exhibit 169, which is the Notice
10 of Second Rule 30(b)(6) Deposition, on page 2, the
11 listed topics, both of these topics, No. 9 and No.
12 10 -- 9, the sale -- sales and fulfillment process
13 for sales outside the United States, and 10, the
14 relationship between sales of the accused product
15 and sales -- and sales of Fortinet services, I
16 believe I've been designated, and I've prepared on
17 both of those topics.

18 Though I will note, as I have before, the
19 overlap between -- of these topics and earlier
20 depositions.

21 Q. Okay. You can hold on to these if you
22 want. If you feel like you want to refer to them
23 later at any time, you're welcome to.

24 I believe this has been previously marked
25 as Exhibit 161. It's got a Bates label of FORT-NPS

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1 053074.

2 A. Where did my glasses go? Maybe in the
3 other room. I'll have to -- I'll try to work
4 without them. But I might have to break and get
5 them if -- but -- okay. Sorry. They were sitting
6 right there.

7 Q. Yeah. I saw them, but maybe not since the
8 last break.

9 MR. COOPER: We can do a two-minute break
10 and I can sprint down.

11 THE WITNESS: Well, I can -- I can read
12 this.

13 MR. CUKOR: Okay.

14 THE WITNESS: It's short and there's only a
15 few lines.

16 MR. CUKOR: Q. Do you know who prepared
17 this document?

18 A. No.

19 Q. Have you ever seen it before?

20 A. I don't think so.

21 Q. Do you recognize the Bates label?

22 A. No.

23 Q. I mean do you recognize it as being
24 produced from Fortinet?

25 A. I mean, it has a Bates label that says

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1 FORT-NPS 053074, but no, I -- I haven't seen this
2 document as it's been produced before.

3 Q. Do you recognize the prefix of the Bates
4 label?

5 A. It just has a Bates label.

6 Q. Do you recognize it as indicating that it
7 was produced by Fortinet?

8 A. I should know that. It -- it looks
9 reasonable. I don't recognize that. I have not
10 reviewed -- if -- I haven't reviewed production that
11 have gone out. I -- I've collected documents and
12 provided them to outside attorneys, so I haven't --
13 I'm not part of the outside litigation team that's
14 marking and producing documents.

15 Q. I understand. So you -- you don't think
16 you've seen this document before?

17 A. No.

18 Q. Okay.

19 MR. CUKOR: Why don't we -- we're going to
20 look at a bunch of documents now. Why don't we take
21 a break and -- you can take a break and then get
22 your glasses.

23 THE VIDEOGRAPHER: Off the record. The
24 time is 4:22 p.m.

25 (Recess taken.)

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1 THE VIDEOGRAPHER: We are back on the
2 record. The time is 4:53 p.m.

3 MR. CUKOR: Q. Do you have your glasses
4 now?

5 A. I've got glasses.

6 Q. Great. In a minute I want to go through
7 some assignment documents with you and have you look
8 at those, and so I'm glad you have your glasses.

9 But before that, I wanted to go over your
10 Interrogatory responses for Interrogatory No. 8.
11 I'll give it to you in front of you.

12 But I believe you told me earlier that in
13 all of the licenses that you entered, none of -- in
14 no case did Fortinet admit validity and infringement
15 of the asserted patents, right?

16 A. I can't recall exactly what I said, but I'm
17 sure I would have said -- would have qualified it to
18 the ones that were -- you know off the top of my
19 head, it's hard to, you know, go back. The
20 original --

21 Q. I don't have one that's --

22 A. Okay. 'Cause there's just a few of them,
23 and it goes -- they stretch back many years, so I'm
24 trying to -- in my head, that's my memory of it.
25 But I -- I really -- and I have reviewed them in

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1 preparation for today, but still there's a lot of --
2 a lot of history there and a lot of -- a lot to try
3 to remember.

4 Q. Right. I'm not -- I'm not trying to trick
5 you on -- on that. And -- and you also, I think,
6 said that -- that to the best of your knowledge,
7 these -- the patents that were identified in these
8 licenses did not necessarily cover the accused
9 products in this case; is that correct?

10 MR. COOPER: Caution the witness not to
11 reveal any attorney/client-privileged
12 communications.

13 THE WITNESS: I -- I can't recall the
14 exactly what I -- what I said. And that sounds like
15 a broader statement than I made.

16 I think what I said was that there was no
17 admission of validity or infringement that I could
18 recall. I don't think I made the substantive
19 representation about the scope of the patent and
20 whether -- whether it covered the -- you know, any
21 Fortinet products.

22 MR. CUKOR: Well, let's go through it,
23 then.

24 What are we up to, Exhibit 170?

25 I'm going to mark as Exhibit 170 Fortinet's

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1 Responses and Objections to Plaintiff's Third Set of
2 Interrogatories.

3 (Plaintiff's Exhibit 170
4 marked for identification.)

5 MR. CUKOR: Q. And I believe Exhibit 170,
6 which has been placed in front of you, which has in
7 it Fortinet's Response to Interrogatory No. 8, for
8 which you have been designated a 30(b)(6) designee,
9 correct?

10 A. So under -- I've been designated under --
11 with respect to all licenses identified in this Rog
12 response. And so it would be the -- the licenses
13 listed here in these various, what, three tables?
14 Two tables? One, two -- looks like three separate
15 tables of documents, is how they're organized.

16 Q. So let's take a look at those. Starting on
17 page 6 of the Interrogatory at the top, the
18 transaction with CoSine Communications. That was a
19 purchase of patents by Fortinet, correct?

20 A. No. It -- or application. So there was no
21 issued patents.

22 Q. No issued patents?

23 A. Not trying to be clever, but just -- I
24 don't -- there was no issued patents.

25 Q. Okay. Were -- at the time, did any of

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1 those applications cover the accused products?

2 A. Oh --

3 MR. COOPER: I object to the question as
4 calling for attorney/client-privileged information
5 and instruct the witness not to answer to the extent
6 the answer would reveal such communications.

7 THE WITNESS: The -- this is back in --
8 this license that's disclosed here in the first row,
9 it was dated 2006. The accused product list is
10 generated in, what, 2010 or -- I don't know,
11 whenever -- during the course of this litigation.

12 So I'm sure there's a timing mismatch
13 between these applications and the accused products,
14 which very likely only predecessor products would
15 have existed at the time.

16 But no analysis of these applications
17 relative to the Fortinet products was done at the
18 time of the -- or prior to the time of the purchase.

19 MR. CUKOR: Q. Okay. Is the same thing
20 true for UTStarcom further down, the UTStarcom
21 transaction?

22 MR. COOPER: Same objection; same
23 instruction.

24 MR. CUKOR: Line 21.

25 THE WITNESS: Line 21. Well, in this case

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1 there are two patents that were purchased, and it is
2 correct that there was no analysis relative to
3 the -- of these patents relative to any Fortinet
4 products or services.

5 MR. CUKOR: Q. Do you believe that these
6 patents have claims that cover the accused products?

7 A. I -- I do not know. I've never done any
8 analysis of these patents relative to any Fortinet
9 products.

10 Q. Why did Fortinet purchase these patents?

11 MR. COOPER: Same objection; same
12 instruction.

13 THE WITNESS: It was a somewhat unique
14 opportunity -- opportunity that was presented to
15 Fortinet, and -- and that created sort of a -- kind
16 of a compelling value proposition.

17 MR. CUKOR: Q. What was the value
18 proposition?

19 A. Essentially, at that time what I was able
20 to do, because there was a -- there was a contact.
21 I can't recall the exact nature of the contact, but
22 there was a contact with UTStarcom, and through that
23 contact I was able to -- I was able to review a very
24 large number of patents and essentially pick -- make
25 a selection of patents that I thought were --

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1 were -- were -- were interesting or complementary
2 and -- and -- and -- and negotiate for their
3 purchase. Sort of a unique -- just kind of a unique
4 opportunity.

5 Q. Do those patents cover transparent
6 application layer firewalls?

7 MR. COOPER: Same objection; same
8 instruction.

9 THE WITNESS: And again, I -- I don't know
10 what you mean when you say "transparent application
11 level firewall." I think that's an ambiguous term.

12 I can't recall exactly what these patents
13 refer to. I -- but I -- to the best of my
14 recollection, I -- I -- as -- as amorphous as that
15 transparent application of a firewall concept is, I
16 don't think that there's a relationship here, but I
17 I'm guessing.

18 MR. CUKOR: Okay.

19 THE WITNESS: I'd have to look at them.

20 MR. CUKOR: Q. How about going back to the
21 Cosign Communications transaction; did any of those
22 application -- what was the technology that those
23 applications related to?

24 A. I think we talked about this earlier.
25 CoSine Communications was in somewhat adjacent space

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1 to Fortinet. They were in the -- more in the
2 routing space, not -- not in the security space.

3 Q. So they were not competitors?

4 A. No. No. And I think this opportunity
5 arose out of a -- you know, a potential -- you know,
6 sort of long-running, but ultimately unsuccessful,
7 partnership discussion. So they were in an adjacent
8 space, so the applications were complementary,
9 but in -- but adjacent.

10 Q. Okay. Was Fortinet able -- ever able to
11 procure a dollar return on investment for the
12 investment made with CoSine Communications?

13 A. A dollar -- what do you -- what do you mean
14 by "a dollar return on the investment"?

15 Q. Money. Let me ask it again.

16 Did Fortinet ever have a return on the
17 investment made with CoSine Communications in the
18 purchase of these patent applications?

19 A. I --

20 Q. Should I ask it more specifically? I mean,
21 if you're struggling with the question, is -- does
22 Fortinet still own those patent applications and the
23 patents that have resulted from them?

24 A. We -- we largely own the CoSine
25 Communications portfolio, but I'm -- we're

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1 blending -- when you say "dollar return," again with
2 each one of these -- you know, with most of these
3 transactions, it's -- it's not a simple -- a simple
4 buy/sell. UTStarcom was about as clean as they get.

5 You'll notice that there's two
6 additional -- on page 7 there's two additional
7 CoSine Communications purchases. So ultimately what
8 we did was we purchased, in a series of three
9 transactions, all of the operating assets of CoSine
10 Communications.

11 And starting with the patent applications,
12 the second transaction involved, you know, the
13 technology and the source code, and the third was
14 the support contracts, inventory and a -- an
15 outsourced arrangement with a company in India. And
16 between those three transactions, they -- they ended
17 up being very beneficial to Fortinet.

18 Q. How so?

19 A. The -- immediately after completing the
20 December 6, 2006, transaction for the support -- for
21 the support contracts, CoSine Communications was
22 largely cycling down its operations.

23 So we picked up the support contract -- you
24 know, I picked up the support facility, but
25 immediately after that, we own -- we had the

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1 technology in-house.

2 Immediately after that, AT&T came back to
3 us, indirectly through CoSine, and needed a support
4 contract written. And another company, L --
5 ALP/ILP, something like that, in Spain also needed a
6 support contract written. So we did write them a
7 support contract.

8 So we basically stepped in to a renewed
9 support contract, along with the agreement that they
10 would swap out the CoSine equipment and replace it
11 with -- in their labs and replace it with Fortinet
12 equipment.

13 And that was the beginning of a
14 long-running AT&T relationship, which I like to take
15 credit for and others within Fortinet like to -- to
16 say that I didn't. So I -- I think it was -- I
17 personally am proud of this -- this series of
18 transactions, and I think it was very beneficial to
19 Fortinet.

20 Q. Okay. But has Fortinet ever sold any of
21 the patents that issued from the CoSine patent
22 applications that were purchased?

23 A. Yes. The -- I can't map it directly
24 without looking at it, but I believe that at least
25 some of the patents that were sold to Google and at

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1 least some of the patents that were sold to Cisco in
2 those three transactions were at least -- you know,
3 it's quite a bit down the line. But I'm sure
4 there -- there was a relationship, that maybe a --
5 you know, an ancestry going back to one or more of
6 the CoSine applications.

7 Q. So is it accurate to say that at least part
8 of Fortinet's business is the buying and selling of
9 intellectual property?

10 A. I don't think that's fair to say. This has
11 been a subject of conversation in our public reports
12 and our quarterly discussions with -- our CFO's
13 quarterly discussions with analysts. That question
14 has been asked and answered.

15 And -- and the answer, which is correct, is
16 that we're not in the business of buying and
17 selling, but we have had -- and we have not put
18 patents out on the market, but we have had a lot of
19 attention and unsolicited offers for some of the
20 assets.

21 And generally we turn those offers down
22 because that's not our business model. But
23 occasionally, I guess three times now, if you don't
24 include sort of the trade, the WhiteCell sort of
25 hybrid trade transaction, three different times,

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1 what a prospective buyer has looked for has been
2 something that was considered redundant or
3 overweight in the Fortinet portfolio.

4 And so -- and it may -- it appeared to make
5 sense to do the deal, but sort of in a nonregular
6 course of business fashion.

7 The CFO said it in a much more concise way.

8 Q. Did you tell me what the technology for the
9 UTStarcom patents was?

10 A. I said I couldn't recall. I can't --
11 UTStarcom is in a -- is in a even further adjacent
12 space. It's somewhat -- and they're obviously a
13 technology company, if I remember right. They're
14 more in wireless.

15 Q. Are they a cell phone company?

16 A. Well, I'm not even sure if they have active
17 operations in the United States now. There was
18 something having to do with cell phone technology
19 and some interface, ground/air interface.

20 You know, everyone has a -- the different
21 players in the space will have very different
22 focuses. I can't recall their specific focus, but I
23 believe it is in, you know, the cellular space.

24 Q. So the UT -- UTStarcom was not a competitor
25 to Fortinet?

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1 A. Not at the time that they were active. You
2 know, and not -- not that I would have -- that rose
3 to the level of attention that I -- that I was aware
4 of it.

5 Q. And is it accurate that -- to say that
6 the -- to the best of your recollection, the patents
7 that you purchased from UTStarcom did not cover the
8 Fortinet core technology?

9 MR. COOPER: Same objection; same
10 instruction.

11 THE WITNESS: And again, the way -- what I
12 said was we did not do an analysis. That wasn't --
13 we weren't -- I wasn't attempt -- it was a unique
14 situation. I was not -- it was, again, fairly
15 opportunistic. And I was not actively looking for
16 patents that covered our technology. I didn't do
17 any analysis relative to it, so I -- I simply don't
18 know.

19 MR. CUKOR: Q. Okay. Let's look at -- on
20 page 7, line 15, the IPLocks communication -- I mean
21 transaction.

22 A. Okay.

23 Q. Were there patents purchased from IPLocks?

24 A. That's a somewhat interesting question.
25 There was -- there's an asset purchase agreement

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1 which I think has been provided. The -- there was a
2 whole list -- it was primarily operating assets.
3 And, you know, essentially all of the U.S.
4 operations and the U.S. employee base came over to
5 Fortinet.

6 IPLocks had one patent and one abandoned
7 patent application, I believe. Those did not
8 transfer. But then interest -- interestingly, when
9 we reviewed the asset purchase agreement and the
10 section drafted actually by IPLocks' attorneys, it
11 was ambiguous, you know, at best, but it appeared
12 that it actually encompassed the -- the patents.

13 So we did start a conversation with IPLocks
14 about whether that should -- those should have come
15 over.

16 Q. But they never did?

17 A. The -- we resolved it by IPLocks keeping
18 the issued patent, and we took the unintentionally
19 abandoned pending application.

20 Q. Did you revive it?

21 A. I think it has been revived and may still
22 be a pending application.

23 Q. So you took possession of a abandoned
24 patent application?

25 A. I believe that's right.

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1 Q. And at the time, you believed it was
2 unintentionally abandoned?

3 A. That's the representation that I -- that
4 was made to us.

5 Q. And is that -- do you have any reason to
6 disbelieve that?

7 A. No.

8 Q. Is that something that happens commonly in
9 the industry?

10 A. Trying to think. I don't think I've ever,
11 with any of ours, intentionally abandoned one. And
12 I'm trying to think whether we've -- in companies --
13 I think that might be -- no, I -- you know, I --
14 I -- there may have been one, CoSine Communications.
15 So I think application -- yeah, it's a long time
16 ago.

17 The CoSine Communications, it may have been
18 during the course of the transaction that a date was
19 missed while we were negotiating that transaction.
20 So there could have been an unintentional
21 abandonment during the course of that transaction,
22 and I think it would slip between the cracks.

23 On IPLocks, I can't recall the exact
24 circumstances of that abandonment. I don't think I
25 have ever -- I have any exposure to an

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1 unintentionally abandoned patent application, except
2 for the -- the '601 patent that's at issue in this
3 case.

4 Q. But the -- in the IPLocks case, Fortinet
5 revived the unintentionally abandoned application?

6 A. I don't know, but I believe that's the
7 case. I haven't heard anything about the
8 prosecution of that application since.

9 Q. Is this -- I'm sorry.
10 Is the same thing true for the CoSine
11 application?

12 A. During -- that case, yes. That was during
13 the tran- -- the actual transaction. I think it was
14 as part of the transaction. It -- it -- it -- that
15 date that was missed needed to get whatever --
16 whatever -- an office action, whatever was missed,
17 needed to get.

18 So it wasn't a patent that was
19 unintentionally abandoned. Both of these -- in both
20 of these cases, these are applications, and so
21 there's a date -- you know, a date missed where some
22 sort of a technical response is due.

23 Q. So -- but the applications needed to be
24 revived?

25 A. Again, I'm not a patent -- you know, a

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1 licensed patent attorney, so -- and I don't do that.
2 But I remember the -- I believe there was a date
3 missed on CoSine during the -- during that
4 transaction. I -- and there might be -- there
5 probably is a rep in the agreement which we can look
6 at. I'd have to talk to my patent counsel at the
7 time to see -- to understand the specifics of that.

8 IPLocks, I believe that there's
9 something -- something similar. And -- and I
10 believe there's some sort of a revival. It's not
11 something I've done, but outside counsel does.

12 Q. And was IPLocks a competitor?

13 A. No.

14 Q. Secure Elements, on the next line.
15 Fortinet purchased all of the Secure Elements
16 assets, correct?

17 A. Yes.

18 Q. And that included patents and patent
19 applications?

20 A. Secure Elements did have a port -- a
21 portfolio. I can't recall how many. But there was
22 at least -- I think there was at least one issued
23 patent. There might have been more than one. I
24 can't -- I think there was at least one patent.

25 It would be in the -- I mean it would be

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1 listed in a schedule on that -- on that asset
2 purchase agreement which would have been provided.

3 Q. Was Secure Elements a competitor?

4 A. Again -- similar to IPLocks. I mean
5 IPLocks was in the security space but -- but was
6 sort of complementary. The IPLocks is a -- a -- I
7 think it's a database security product. And so we
8 might have had something that was at least
9 tangentially competitive, but I think it was
10 rounding out the security offering.

11 Secure Elements, I think has become -- I
12 think IPLocks has become FortiDB. Secure Elements
13 has become FortiScan. So it rounded out -- it
14 rounded out -- oh -- Secure Elements was in -- I
15 think that -- well, that's that invulnerability --
16 sort of sort of vulnerability scanning.

17 Q. So FortiDB and FortiScan, neither of those
18 are accused products, right?

19 A. Correct.

20 Q. And the next -- the next transaction down
21 is Woven Systems. Was Woven Systems a competitor of
22 Fortinet?

23 A. Probably in a similar way to -- you know,
24 sort of tangential way to IPLocks and Secure
25 Elements. May be a bit -- just depending on how you

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1 look at it.

2 Woven Systems had sort of a load
3 balancing -- was a load balancing product. Fortinet
4 had load -- had and has load balancing functionality
5 and -- but -- but -- but these -- Woven Systems was
6 more focused in that area.

7 Q. Did Woven Systems sell a unified threat
8 management firewall?

9 A. No. They were -- they were a load
10 balancing WAN optimization or at least related to
11 those spaces.

12 Q. So they were not a firewall company?

13 A. I don't think that they had any products
14 that you would classify as a firewall necessarily.
15 I mean, given that they had, you know, a network
16 product.

17 I mean I wouldn't be surprised to know that
18 there -- there were, you know, scanning capabilities
19 or something that would be some sort of
20 protective -- you know, limited protective
21 capabilities. But whether they were a dedicated,
22 focused firewall product in the classic sense, the
23 broader sense, I don't -- I don't believe so.

24 What?

25 Q. I just forgot my question. I'm sorry.

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1 Let's go to the next one, to WhiteCell.

2 Oh, no I remembered my question.

3 In the other ones, IPLocks and Secure
4 Elements, I think you were able to identify Fortinet
5 products that these acquired companies became.

6 Did Woven Systems become a Fortinet
7 product?

8 A. This one is a little more attenuated, so I
9 can definitely be incorrect. I've asked this
10 question a number of times internally. I believe --
11 we had the FortiSwitch product before we purchased
12 Woven Systems. I believe that initially we may have
13 rebadged one of the Woven Systems as a FortiSwitch
14 product. I believe that's been end-of-lifed.

15 At the same time, I think certain pieces of
16 the Woven Systems technology has -- you know, has
17 found its way into other -- into other Fortinet
18 products.

19 Q. How about the WhiteCell one?

20 A. What about WhiteCell?

21 Q. Was WhiteCell a competitor?

22 A. WhiteCell was very, very small. It was --
23 I don't recall the exact -- I had conversations
24 with, I think, two people at WhiteCell. It was a
25 small -- very small group of four or five people.

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1 So some entrepreneurs. So it's hard to picture
2 them -- you know, to view them as competitors.

3 But the WhiteCell technology was in -- was
4 in Fortinet space.

5 Q. Did the WhiteCell technology become a
6 Fortinet product?

7 A. We -- we did not -- we were unsuccessful
8 in -- I was unsuccessful in purchasing the WhiteCell
9 technology. I believe I mentioned that before.

10 When they first approached us and pitched
11 the sale of the business to us, I believe there was
12 one pending patent application. And the main
13 purchase was a -- was a -- was a sort of a
14 technology, some source code. So it was a product.
15 A relatively early stage -- a relatively early stage
16 product.

17 I was unsuccessful in getting the budget --
18 I did -- I did -- try to purchase, but I was
19 unsuccessful initially. And then later we entered
20 into this transaction, just picking up what was then
21 an issued patent and a pending application in
22 exchange for two -- I couldn't remember if it was
23 one or two -- Secure -- patents that were acquired
24 from Secure Elements.

25 Q. And did these WhiteCell patents or patent

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1 applications become a Fortinet technology?

2 A. Well, they were just -- it's just a -- a
3 patent application. It's -- it's a patent family is
4 all it is. So it -- we didn't purchase the
5 technology from them.

6 Q. But did you develop any Fortinet technology
7 that was based on these patents or patent
8 applications?

9 MR. COOPER: Same objection; same
10 instruction.

11 THE WITNESS: So if you're asking whether
12 we looked at this -- you know, anyone at Fortinet
13 looked at the patent application, the filed patent
14 application and developed technology based on that,
15 the answer would be no.

16 MR. CUKOR: Q. None of the -- the acquired
17 patents were -- that we've talked about were
18 acquired because Fortinet believed that the Fortinet
19 products were covered by those technologies, right,
20 those patents?

21 MR. COOPER: Same objection; same
22 instruction.

23 THE WITNESS: I think you're asking about
24 sort of the nonexistence of a factor. So -- and
25 I -- and I think that's right.

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1 So Secure Elements -- I mean, it was an
2 asset purchase primarily. It was a complementary
3 asset purchase. So their patent portfolio largely
4 was in line with, you know, their products. And it
5 came with a series of -- you know, a set of -- of
6 patents and patent applications.

7 The Woven Systems, again, was an asset
8 purchase, where we're buying assets. And they
9 had -- I think it was just -- there might have been
10 an issued patent or two, but it was mostly just
11 applications that came with the assets, the primary
12 focus being the assets.

13 IPLocks obviously initially was just an
14 asset purchase, so these are -- these are business
15 purchases, and there was never a -- an analysis of
16 the -- in any one of this -- in any one of these
17 cases, there never was an analysis of the patents
18 relative to Fortinet products.

19 MR. CUKOR: Q. Is that true for all of the
20 transactions identified in the table of category 2?

21 MR. COOPER: Same objection; same
22 instruction.

23 THE WITNESS: Yes.

24 MR. CUKOR: Q. Okay. With regard to
25 TalkSwitch, what was the TalkSwitch technology?

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1 A. TalkSwitch is a -- and this is currently --
2 I believe is our FortiVoice product. TalkSwitch is
3 a -- they sell a telephone system and a VoIP PBX.

4 (Discussion off the record.)

5 MR. CUKOR: Q. And going back to
6 category -- the category 1 table for a minute, were
7 any of the licenses or acquisitions done by Fortinet
8 that are identified in category -- in the category 1
9 table done because of Fortinet's belief that those
10 patents or applications covered Fortinet technology?

11 A. So I think we've covered them. The -- for
12 the CoSine Communications, it's an adjacent and
13 complementary space. We didn't do the analysis
14 whether it covered our products.

15 The F-Secure license was a license out.

16 Color- -- Colorado Remediation we've
17 discussed, is a -- is a sale.

18 AST is a sale.

19 UTStarcom was a purchase. And I mentioned
20 I did not do a -- I did not do an analysis of
21 whether those patents covered Fortinet products.

22 The next two are to Cisco and are sales.
23 And that's -- and that's it. So I think we've
24 talked about the two purchases.

25 Q. Okay. Let's go to the IntruGuard on page

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1 7, line 28. What technology was IntruGuard
2 technology?

3 A. IntruGuard is a small -- was a small
4 DDoS -- what is that -- denial of service --
5 something -- DDoS company with a purchase of assets.
6 And I -- it wasn't my deal, so it's one of the ones
7 I'm least -- it's probably the -- one of the ones
8 I'm least familiar with, but I note that I'm a -- it
9 doesn't -- didn't seem to have come with any IP
10 assets, other than just the technology and the
11 people.

12 Q. Okay. How about XDN; what technology was
13 involved with XDN?

14 A. XDN is an adjacent product related to
15 network acceleration through redirection and
16 caching, so not directly competitive or competitive
17 only with certain features, but -- but
18 complementary.

19 Q. And did XDN become a Fortinet product?

20 A. I believe -- yes, we are -- Fortinet
21 continues to sell the XDN -- it's -- the redirector
22 service. I don't know how it's been named. I think
23 it's XDN Redirector and XDN Cache or something.
24 I -- Crowd -- CrowdDirector and CrowdCache I think
25 were their names when they were at XDN. And I don't

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1 know -- there was some discussion about naming
2 within marketing. I don't -- I don't know how it's
3 been named.

4 Q. Are those XDN products that are now
5 Fortinet products part of the accused products in
6 this case?

7 A. I don't believe so, no.

8 Q. Okay. And the Coyote Point Systems what
9 technology was that?

10 A. Coyote Point Systems sells a series of load
11 balancing appliances.

12 Q. And did -- it didn't have any IP in the
13 transaction. Did the Coyote Point Systems
14 acquisition read to any Fortinet products?

15 A. This was a -- whoops. Yes, it says, "Asset
16 purchase agreement/merger." This was a merger, not
17 an asset purchase.

18 So Coyote Point Systems still exists as a
19 Fortinet subsidiary, and there was a reverse
20 triangular merger. And Coyote Points [sic] is still
21 selling the Coyote Point Systems. There -- Fortinet
22 also sells its own and some OEM load balancing
23 systems. And there -- there is a road map for
24 rebranding the Coyote Point system appliances as
25 Fortinet appliances.

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1 Q. But none of those Coyote Point Systems
2 appliances are accused products in this case,
3 correct?

4 A. That -- that is correct.

5 Q. And are any of the licensors/sellers in
6 either category 1 table or category 2 table
7 companies that you would have considered competitors
8 in the firewall market space?

9 A. What I'm -- can you repeat that question or
10 read that question back.

11 MR. CUKOR: Ms. Moose.

12 (Record read as follows:

13 QUESTION: And are any of the
14 licensors/sellers in either category 1 table
15 or category 2 table companies that you would
16 have considered competitors in the firewall
17 market space?)

18 THE WITNESS: Again, we've gone through
19 these one by one, and I think they are adjacent
20 space. There are overlap with certain features that
21 exist on our firewall products.

22 But I -- looking at these companies --
23 CoSine Communications, UTStarcom, IPLocks, Secure
24 Elements, Woven Systems, TalkSwitch, WhiteCell,
25 IntruGuard, XDN, Coyote Point -- I don't think under

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1 a sort of a classic definition, sort of a broadly,
2 you know, classic -- none of these would be focused
3 on producing or selling a firewall.

4 MR. CUKOR: Okay. I'm going to ask you
5 questions in a minute about the category 3 table,
6 but we're out of tape. So we'll change the tape.

7 THE WITNESS: Okay.

8 MR. CUKOR: We'll go off the record. And
9 if you need to take a break, we can do that, but if
10 not, we can just keep going.

11 THE VIDEOGRAPHER: Going off the record,
12 the time is 5:39 p.m., and we're at the end of
13 videotape number 3 in the deposition of Todd Nelson.

14 (Recess taken.)

15 THE VIDEOGRAPHER: We are going back on the
16 record. Here marks the beginning of videotape
17 number 4 in the deposition of Todd Nelson. The time
18 is 5:51 p.m.

19 MR. CUKOR: Q. Let me turn your attention
20 to the table listed in category 3 of page 8 of
21 Fortinet's responses and objections to NPS's third
22 set of Interrogatories, what's been marked as
23 Exhibit 170. Do you see the table?

24 A. Yes.

25 Q. Were any of the patents or applications

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1 identified in that table found to be valid and
2 infringed?

3 A. In what -- it's a little bit of a tricky
4 question. In what setting? I mean, to answer it,
5 the Trend Micro case, which is the second line down,
6 which was settled in January 27th, 2006. So this
7 case -- there was an ITC case and a parallel
8 district court case that was stayed.

9 And in this case at this time, the ITC
10 determination was that there were claims that were
11 not invalid, which I would differentiate from valid
12 and infringed. But --

13 Q. Okay.

14 A. -- it goes on.

15 Q. Any of the other ones?

16 A. No.

17 Q. Okay. Well, we'll come back to the Trend
18 Micro one in a minute.

19 What was the ClearSwift technology?

20 A. ClearSwift was an early license --
21 licensee -- licensee of the Trend Micro '600 patent
22 which had an ability to create a -- essentially a
23 sublicense.

24 Q. Oh, right. You tried to get a license
25 through ClearSwift to avoid the Trend Micro

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1 litigation?

2 A. So -- I mean --

3 MR. COOPER: Same objection; same
4 instruction.

5 THE WITNESS: So clarify -- I mean just
6 clarifying the -- on the -- the original question on
7 Trend Micro. So I think that the ITC -- and I can't
8 recall the exact claims, but the ITC found
9 certain -- a certain subset of the claims to be
10 invalid. They found a certain -- but it's an ITC
11 action, which is not really binding.

12 I -- I -- the ITC found certain -- at that
13 time, based on the presented art, not invalid, but
14 later I believe most, if not all, of those were in
15 fact invalidated, so it's a little bit difficult to
16 answer -- you know, to be accurate about that prior
17 question you asked.

18 The ClearSwift sublicense, we didn't
19 attempt to get a license. We did -- we did enter
20 into an agreement with ClearSwift. And we -- this
21 was after -- this is during my time. The Trend
22 Micro -- Trend Micro ITC issue or litigation
23 finished before -- the original ITC litigation or
24 action term- -- you know, ended before I -- you
25 know, that -- that -- I came in right at the very

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1 tail end of that.

2 I sought out and negotiated the Clear --
3 the ClearSwift sublicense because the ITC order, you
4 know, says, you know, stop shipping products or get
5 a license. So that was a license in response to
6 that order.

7 MR. CUKOR: Q. Which products did the ITC
8 require you to stop shipping?

9 A. I -- I think it was -- you know, it was
10 essentially the -- the FortiGate products were --
11 the FortiGate products -- product family.

12 Q. Those are the same products that are
13 accused in this litigation?

14 A. No. Because that was 2000 -- you know,
15 almost, you know, what, eight years earlier. So
16 given the rapid product cycles, you know, I don't
17 think that there would be any products that were
18 around at that time that would be still available
19 today.

20 Q. But they're the same product families,
21 right?

22 A. The name is the same. I mean the product
23 family -- I mean Fortinet has been Fortinet since
24 2002 and has named its firewall products or UTM
25 products FortiGate -- I mean common naming

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1 convention consistently.

2 Q. So the FortiGate products that were
3 excluded by the ITC in the Trend Micro case were UTM
4 firewalls?

5 A. Yes, I believe the UTM -- I think Fortinet
6 was using the UTM marketing, whatever you -- UTM --
7 I mean, you know, sort of a marketing phrase. They
8 were using that back in that time frame.

9 Q. And was -- were the entire FortiGate
10 products excluded or just a portion of the FortiGate
11 products excluded by the ITC in the Trend Micro
12 case?

13 A. I haven't reviewed the -- there was a, you
14 know, exclusion order that issued. I haven't
15 reviewed that in many, many years. I mean probably
16 since, you know, on or around these dates in the
17 mid-2000s.

18 Q. Okay.

19 A. So I can't recall specifically.

20 Q. Okay. What about the WorldCheck [sic]
21 technology? Actually, before that, was Trend Micro
22 a competitor with Fortinet?

23 A. Trend Micro is -- was and I believe still
24 is in the security space. There's overlap in some
25 of the products. Very little. I don't think we

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1 compete with Trend Micro -- I don't think I've ever
2 seen a competitive report comparing us to Trend
3 Micro. I think they're more in the endpoint
4 security space.

5 Q. Do they sell firewalls?

6 A. I -- I'm not sure. I don't think -- I
7 don't think they do. I think at -- at one time or
8 another -- and again I'm -- I'm -- I'm kind of sort
9 of remembering sort of anecdotal, you know, things
10 that I've heard.

11 I think they have at one time or another
12 either OEM'ed or sold some sort of an appliance, but
13 I don't know if they have in many years.

14 Q. Was that at the time that the license
15 that's identified in category 3 was executed?

16 A. I don't -- my impression -- again, I was --
17 it was -- I came in after the case. The ITC case
18 had largely terminated and the exclusion order was
19 issuing.

20 I don't -- I've never done an analysis of
21 the Trend Micro products or product line. But I
22 believe they've consistently been more in the
23 antivirus sort of endpoint security market as
24 opposed to network security market. But I -- but I
25 don't have direct knowledge about -- about the Trend

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1 Micro products.

2 Q. Okay. What's the WorldCheck technology?

3 A. Oh, yes. WordCheck was a lawsuit -- a
4 nonpracticing entity lawsuit, I believe filed in
5 Texas a few years back, naming -- I believe it was
6 the second -- it was the second law -- sort of
7 lawsuit. The first lawsuit -- it was the second
8 lawsuit on that patent and named some -- maybe some
9 huge number of defendants. We were -- we were one
10 of them.

11 Q. Was it for a firewall technology?

12 A. No.

13 Q. What did the technology relate to?

14 A. I believe it was -- as WordCheck suggests,
15 it was some sort of a word-checking method patent.

16 Q. Okay.

17 A. I mean really, it was -- I think it was
18 from some sort of word processor origins -- based
19 origins.

20 Q. Okay. How about Brandy -- excuse me.

21 So I -- I guess WordCheck -- you don't
22 consider WordCheck to be a competitor?

23 A. No. I think it's just a nonpracticing
24 entity.

25 Q. Okay. And how about Brandywine

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1 Communications?

2 A. Brandywine Communications is another
3 nonpracticing entity. If I remember correctly, I
4 believe this case was also brought in Texas. Oh,
5 no. I think this case was brought in Florida,
6 against a -- I can't remember exactly.

7 I think it might have been in one of the
8 districts in Florida against either a large number
9 of defendants or a number of individual cases or
10 some defendants -- same patent grouped with --
11 groupings of defendants in separately filed cases.
12 I can't remember the exact context of the
13 litigation, but I believe it was Florida.

14 Q. Did the patent have to do with firewall
15 technology?

16 A. No, I do not believe it did.

17 Q. And do you consider Brandywine to be a
18 competitor of Fortinet?

19 A. No.

20 Q. I'm sorry?

21 A. No. I'm sorry.

22 Q. Let's discuss the -- or actually, can you
23 tell me how the dispute with Trend Micro began. It
24 was a complicated litigation history, I think.
25 Maybe you could generally walk me through what

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1 happened in the litigation dispute between Fortinet
2 and Trend Micro.

3 MR. COOPER: Same objection; same
4 instruction.

5 THE WITNESS: Trend Micro sued Fortinet --
6 I -- this is before my time. I don't recall the
7 exact date. Probably would have been in either late
8 2003, early 2004, and sued them both in the ITC and
9 in Federal District Court.

10 I think the -- the district court
11 litigation was stayed pending the ITC outcome, and
12 the ITC ID issued in May of 2005. I joined Fortinet
13 in late June 2005.

14 MR. CUKOR: Q. Then there was some
15 disagreement about whether there was a payment made
16 or -- I mean, I see that there's -- Trend Micro's
17 listed twice in the table in category 3.

18 Did they claim that you failed to make a
19 license payment or violated your license agreement
20 in some way?

21 MR. COOPER: Same objection; same
22 instruction.

23 THE WITNESS: In -- and I can't recall the
24 exact dates, but we settled the Trend Micro
25 litigation after asserting the ClearSwift

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1 sublicense. We settled that on January --
2 January 27th, 2006.

3 Then -- I can't recall the exact date, but
4 Fortinet -- there was some change in the law. I
5 think the case was MedImmune, which allowed
6 licensors to challenge the validity -- you know, to
7 challenge -- challenge the validity of a patent
8 notwithstanding the fact that -- that they were
9 licensed and I think under one -- well, I -- I
10 don't -- you know, I don't want to go into the legal
11 analysis behind it.

12 But essentially this was Fortinet
13 challenged the validity of the patent -- actually
14 the two patents in the family and -- and stopped
15 making payments to Trend Micro.

16 MR. CUKOR: Okay. I understand.

17 Q. So in 2006, Fortinet did pay Trend Micro

18 [REDACTED]

19 A. Yes.

20 Q. Okay. And then in 2011, did Fortinet
21 terminate its license agreement with Trend Micro so
22 that it could challenge the validity -- the validity
23 of the '600 patent?

24 A. What was the date you just -- the date you
25 just said?

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1 Q. 2011.

2 A. No, that was --

3 MR. COOPER: Same.

4 THE WITNESS: -- the final settlement date.

5 MR. CUKOR: Q. Oh. But 2010 or '9?

6 A. Maybe '9.

7 Q. Okay.

8 A. It ran -- this was a series of -- a series
9 of litigations in federal court, federal appeals
10 court and state court.

11 Q. So at -- sometime in 2009, or around there,
12 Fortinet terminated the license agreement with Trend
13 Micro so that it could challenge the validity of the
14 '600 patent, correct?

15 MR. COOPER: Same objection; same
16 instruction.

17 THE WITNESS: I don't think it's accurate
18 to say that we terminated the license agreement.

19 MR. CUKOR: Q. So you continued paying
20 the -- okay. So then why -- let me ask it this way:
21 In December 2011, did Fortinet make a [REDACTED]
22 payment to Trend Micro?

23 A. In 2011, December 21 -- I don't know if the
24 payment happened in 2011. I note that it's at the
25 very end of the year. It might have happened in --

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1 the payment might have happened in Q1 2012. I can't
2 recall the exact timing.

3 Q. But another [REDACTED] was paid to Trend
4 Micro?

5 A. Correct.

6 Q. And why did Fortinet have to pay another
7 [REDACTED] when it already had a license under the
8 '600 patent from 2006?

9 A. The [REDACTED] payment is a -- was the
10 settlement of all the outstanding litigation. There
11 was a -- there was a federal court action which was
12 dismissed and then another -- an appeal and a second
13 federal court action filed.

14 I can't remember -- there was a series
15 of -- of litigation maneuvers. Fortinet disputed
16 its -- it's obligation to pay royalties on what it
17 considered to be an invalid patent. The law had
18 changed, and new evidence of invalid -- validity had
19 come out.

20 Trend Micro asserted that regardless of
21 validity, the -- and I'm trying to characterize
22 this. I believe the filings are -- most of the
23 filings are public. So -- so the more accurate
24 picture would probably be gained from the actual
25 public filings.

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1 Trend Micro disputed obviously wanted to be
2 continued to be paid and disputed whether --
3 basically took the position that even if the -- if I
4 if I'm characterizing this correctly, even if the
5 patent was invalid, Fortinet still needed to pay.

6 At some point in the litigation, a decision
7 was made to -- to -- you know, to settle all of the
8 outstanding litigation, and -- and -- and that was
9 the settlement amount, a single fully -- fully done.

10 And it included -- and the license -- I
11 believe you have a copy of this, and it includes a
12 covenant not to sue for some period. It -- you
13 know, it's -- it's -- a little bit complicated. It
14 lists the various litigations that are resolved.
15 I'm -- I'm going to misspeak if I try to
16 characterize them.

17 Q. So how much money in total did Fortinet pay
18 to Trend Micro in connection with the patent
19 5,623,600?

20 A. I'm not aware of the total. Obviously
21 there's a [REDACTED] initial payment back in 2006,
22 and there's a [REDACTED] final settlement payment.
23 So [REDACTED] plus, you know, the -- the -- the
24 variable royalties, which ran for some time before
25 the -- before Fortinet stopped paying and challenged

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1 the -- the -- its -- its obligation to continue
2 paying.

3 Q. And were the variable royalties based on
4 all of Fortinet's sales or just sales of some
5 products?

6 A. Sales of some products.

7 Q. Which products?

8 A. I would -- I don't recall the -- it would
9 be in the language of the -- the agreement. I don't
10 recall the exact products and the -- but I believe
11 it was U.S. -- you know, U.S. sales. It was very
12 craft -- very carefully crafted language. I'd --
13 I'd hesitate to characterize here.

14 Q. Was it the FortiGate products?

15 A. It -- it -- it is, but it's -- it's -- a --
16 you know, it's -- and I -- I mean it's crafted
17 having to do with the language of the patent so it's
18 a -- it's sort of a carefully crafted language that
19 carefully includes and excludes certain products.
20 It's been many years since I've looked at it, so ...

21 Q. What was the approximate dollar amount of
22 the variable royalties over the years?

23 A. I do not know. There were a set of
24 minimums and -- a set of minimum payments which are
25 in the license agreement. I believe the payments

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1 stayed largely under the limit -- maybe the entire
2 time were under the minimums up to the point that we
3 challenged it.

4 Q. So you just paid the minimums?

5 A. Yes.

6 Q. Okay.

7 MR. CUKOR: Let's mark as Exhibit 171 the
8 final settlement agreement between Trend Micro and
9 Fortinet, Inc.

10 (Plaintiff's Exhibit 171
11 marked for identification.)

12 MR. CUKOR: Q. Exhibit 171 is in front of
13 you, correct?

14 A. Yes.

15 Q. And is this the 2011 settlement agreement?

16 A. It appears to be.

17 Q. And how is the [REDACTED] number paid to
18 Trend Micro under this agreement calculated?

19 A. On page 2 it's listed expressly. So it --
20 it's not calculated.

21 Q. Where did it come from?

22 A. It's on the -- the second line of -- of
23 category of -- of 4, subcategory A.

24 Q. Was it just a number that the parties
25 agreed to, or was it based on some relation to sales

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1 of Fortinet products?

2 A. I believe it was basically a negotiated
3 number largely divorced from any product sales or
4 royalty. But I can't speak for what -- the
5 reasoning behind trends -- what their thinking was.
6 It was a negotiated number.

7 Q. Okay. And nobody told you -- or during the
8 course of the negotiations, Trend Micro never told
9 Fortinet that it was -- their calculation was based
10 on a percentage of Fortinet's sales?

11 MR. COOPER: Same objection; same
12 instruction.

13 THE WITNESS: The Trend Micro, during the
14 course of negotiations, made a number of arguments,
15 presenting justifications, large numbers to
16 encourage -- to encourage Fortinet to increase their
17 number.

18 MR. CUKOR: Q. Did Trend Micro suggest a
19 specific royalty rate that was appropriate to be
20 paid for this license?

21 MR. COOPER: Same objection; same
22 instruction.

23 THE WITNESS: No, this isn't about a
24 royalty rate. This -- this -- the royal -- there
25 was a royalty rate -- or a variable set of royalty

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1 rates in the earlier license. This is -- this was
2 purely a -- you know sort of an artificial
3 settlement number based on -- based on litigation
4 risk and cost to defense and a number of other
5 categories.

6 MR. CUKOR: Q. Okay. If you flip a couple
7 of pages in to Exhibit A, is that the 2006
8 settlement that's attached to this exhibit?

9 A. Can I take just a moment -- a few moments
10 and just read -- I haven't looked at that this in
11 quite some time.

12 Q. Yes, absolutely. You didn't look at this
13 to prepare for your deposition?

14 A. I -- this one I took a quick glance, but I
15 don't -- I thought I would be very familiar with it.
16 I want to look at the document that's in front of me
17 just to make sure that it's what I think it is.

18 So your question was about Exhibit A?

19 Q. Well, are you done flipping through the
20 document to --

21 A. Yes, this -- this appears to be the
22 settlement agreement and --

23 Q. Okay. And when you said before that you
24 hadn't seen this in quite some time, was that a
25 mistake?

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1 A. I'm thinking about it substantively. I did
2 review the license agreements that were listed in
3 preparation for this deposition. But now we're --
4 we're asking sort of much more in-depth questions
5 about the litigation background, the motivation,
6 whether there was royalties, so we're expanding way
7 beyond this.

8 So I actually wanted to refresh my
9 recollection, thinking about some of the
10 negotiations that occurred. I'm -- I'm familiar
11 with this document, and I did read the documents in
12 prep -- at least quickly -- in preparation for this.
13 But I was intimately involved with the negotiations
14 on both of these agreements.

15 Q. Okay. So -- but when you said you hadn't
16 seen this document in quite some time that was a
17 mistake, right?

18 A. Essentially, I'm -- I'm -- yes. I meant
19 substantively. I mean, it's been a long time since
20 I -- since I negotiated this is what I -- is what I
21 believe I, sort of, meant to say.

22 Q. Okay.

23 A. So I wanted to refresh the -- my
24 recollection of the negotiations since that's where
25 the questioning was going.

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1 Q. Okay. So now focusing your attention on
2 Exhibit A, what was the royalty rate that was paid
3 under the '600 patent?

4 A. Which license are you referring to now?
5 I'm sorry.

6 Q. Exhibit A to what's been marked as Exhibit
7 171. And that's the 2006 settlement and patent
8 license agreement?

9 A. So Exhibit A to Exhibit A -- so the Exhibit
10 A to the 2006 -- the January 27, 2006, settlement
11 agreement -- Exhibit A to that, which is on --

12 Q. What's the page number?

13 A. It's on page 15. But that numbering is
14 from the 2000- --

15 MR. COOPER: Is there a Bates number?

16 THE WITNESS: Yeah. There's a Bates number
17 that I -- of the royalty table that's 149340.

18 MR. CUKOR: Okay.

19 THE WITNESS: And there's a schedule of
20 annual minimum payments, quarterly minimum payments
21 and royal percentages listed there.

22 MR. CUKOR: Q. And the -- the royalty
23 percentages range from four percent to two and a
24 half percent, correct?

25 A. This table sets forth royalty percentages

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1 in the final column to the right that begin -- begin
2 at four percent and drop down to 2.5 percent.

3 Q. And why did they decrease over time?

4 A. Again, I see -- I see this in front of me.
5 I'm trying to remember the negotiations, which is
6 the background that I believe you're asking me for
7 again.

8 This was a negotiated settlement. I -- I
9 can't -- I can't recall the exact discussions
10 around -- or justifications for the royalty
11 percentages that are listed here.

12 Q. And the percentages there, they applied to
13 the sale of the Fortinet hardware, the software and
14 the services associated with the FortiGate products,
15 correct?

16 A. They apply to U.S. revenue as it's defined
17 here on this page 15, Bates number 149340. Revenue
18 recognized by Fortinet. So U.S. revenue being --
19 means:

20 "Revenue recognized by Fortinet and
21 its subsidiaries in the United States in
22 accordance with GAAP that is attributable
23 to the manufacture for export use,
24 distribution, sale or license of licensed
25 products in the United States in an arm's

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1 length, bona fide transaction between
2 Fortinet and the subsidiary as the first
3 party and a" -- "and a third party other
4 than Fortinet and its subsidiaries as a
5 second party after the effective date net
6 of returns, rebates, credits, commodities,
7 taxes, value-added taxes, sales and use
8 taxes and provision for bad debt. In no
9 event shall the revenue for any product,
10 whether hardware or software or
11 subscription service be included in the
12 calculation of U.S. revenue more than a
13 single time."

14 Q. Stop there for a second. Or you can keep
15 reading to yourself.

16 A. I'm sorry?

17 Q. I'm sorry. If you want to keep reading to
18 yourself, I don't want to stop you.

19 A. It's very complicated. And this was
20 heavily negotiated, so I --

21 Q. Let me ask you the question again --

22 A. Yes.

23 Q. -- while you're -- while you're reading,
24 and you can look at it.

25 Is it true that the royalty base for the

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1 2006 Trend Micro license agreement includes
2 hardware, software and services associated with the
3 FortiGate products?

4 A. I want to be precise in answering 'cause
5 this was very carefully crafted.

6 License -- so licensed products, which --
7 which applies to the license revenue, which had some
8 carve-outs and returns and stuff, so I just don't
9 want to speak in broad generalizations about this.

10 So hardware/software products and -- or --
11 or systems containing or providing computer virus
12 detection and/or elimination functionality to
13 protect the network. So this network antivirus
14 functionality. So it doesn't specifically refer to
15 the -- the FortiGate products.

16 The essential components that are
17 especially made or adopted for use in the network
18 antivirus functionality and not suitable for
19 substantial use other than for the network
20 anticipate virus functionality, and then services
21 for licensed products which services include but are
22 not limited to software subscription, renewal and
23 maintenance relating to the detection and limitation
24 of computer viruses to protect the network provided
25 that such products or services are deployed by or

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1 for Fortinet, so based on specifications provided
2 for or subsidiary or products -- sorry. So it's --
3 it's a long and -- and convoluted.

4 But there was -- there was a set of
5 licensed products that was defined in a way that was
6 abstracted, and there was a set of services that was
7 equivalently abstracted because the services were
8 specific to that -- this network virus detection
9 elimination functionality. So it's -- it's not
10 just -- you know, I don't -- let me see if I've
11 got --

12 Q. It's in Exhibit C you might want to turn
13 to.

14 A. Yeah. Yeah. Let me look for the exhibits.

15 Q. It's page 149345?

16 A. Whoops.

17 Q. And just so the court reporter has a little
18 bit easier time, if you want to read out loud,
19 that's fine --

20 A. I'm sorry. I blurred it. Yes, I know. I
21 know. That's not very nice.

22 So then currently licensed products,
23 FortiGate insist -- FortiGate systems, including the
24 following families, so we list the families, which
25 as of the effective date include FortiOS 2.8 or 3.0

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1 with antivirus software, FortiMail, FortiMail,
2 FortiWifi, FortiGuard antivirus subscription
3 services for the licensed products and FortiCare for
4 the licensed products.

5 Q. Okay. Having reviewed what you've just
6 reviewed, is it accurate to say that the royalty
7 base for the 2006 Trend Micro license agreement
8 included hardware, software and services?

9 A. It had elements of -- of each of those
10 included if they had -- if they were related to
11 that -- the antivirus functionality.

12 Q. Okay. How was the [REDACTED] for past use
13 calculated?

14 A. I think -- I think you already asked that
15 question, where we -- where was that -- did that --
16 that number come from. Or was that about the [REDACTED]?

17 Q. I asked that -- it was about the [REDACTED].

18 A. About the [REDACTED]. So, again, I think it was a
19 negotiated number, a fairly abstract negotiated
20 number.

21 Q. Okay. And the -- so it -- let me -- sorry.

22 Did that [REDACTED] come about based on a
23 particular royalty rate?

24 A. I think in the same way that I answered the
25 previous question, I believe that each sides [sic]

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1 were presenting various scenarios to justify one
2 number or another. I think both sides also may have
3 had just an abstract number, minimum payment number,
4 that's fairly divorced from any sort of unit sales
5 or -- or royalty.

6 And it was finding a number that -- that
7 was a common -- that was a common ground and also
8 finding a -- it was a process of finding a -- you
9 know, and included -- you know, the factors
10 included, you know, the cost of litigation, the --
11 the threat of a continued prosecution and exclusion,
12 leveraging the -- the IT -- the existing ITC
13 exclusion order.

14 Q. What was the royalty rate that Trend Micro
15 wanted?

16 A. There was -- I don't recall a -- you know,
17 a demand for -- there was -- there were many demands
18 over time -- or back and forth -- it took --

19 Q. What's the lowest royalty rate that you can
20 remember that Trend Micro said would be appropriate?

21 A. I don't -- I don't --

22 MR. COOPER: Same objection; same
23 instruction.

24 THE WITNESS: I don't -- so we're back in
25 the 2006 settlement. This is executed on

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1 January 27th, 2006. I believe we signed the
2 ClearSwift license and asserted it, that we were
3 licensed, maybe as early as October, sort of
4 October/November time frame.

5 And there was a fairly continuous
6 back-and-forth of negotiations between that date and
7 the final settlement date. So there were a lot of
8 proposals back and forth.

9 MR. CUKOR: Q. Do you remember what Trend
10 Micro's lowest royalty rate proposal was?

11 A. If you're asking if there was just a
12 royalty, a single royalty rate, I don't recall ever
13 receiving a -- a proposal from Trend for a single --
14 a single royalty rate.

15 Q. Do you recall receiving any proposal from
16 Trend with a royalty rate in it?

17 MR. COOPER: Same objection; same
18 instruction.

19 THE WITNESS: I think the royalty rates
20 that are reflected in the agreement are largely a
21 concession to what Trend was looking for. I think
22 the -- the dispute centered around the up-front
23 payment.

24 MR. CUKOR: Q. And did Fortinet consider
25 the royalties that are reflected in the 2006

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1 agreement to be reasonable?

2 MR. COOPER: Same objection; same
3 instruction.

4 THE WITNESS: I don't think -- again, I
5 don't want to disclose any privileged
6 communications. I don't think -- and I'm not sure
7 that I understand the question.

8 If you were -- if you're asking whether, in
9 the abstract, that would be considered a reasonable
10 royalty rate for that patent in the absence of the
11 litigation, in the absence of the -- you know, the
12 exclusion order, that's one -- one question.

13 But this was negotiated settlement, and
14 Fortinet entered into this negotiated settlement, so
15 it, at that time, agreed to this negotiated
16 settlement.

17 MR. CUKOR: Q. Okay. Can you turn to page
18 FORT-NPS 149340. You were looking at that page
19 before. It's the Exhibit A, royalties.

20 A. What was that number again? I'm sorry.

21 Q. 149340.

22 A. Okay.

23 Q. And I want to direct your attention to the
24 paragraph that you were reading before. It's titled
25 "U.S. Revenue."

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1 A. Okay.

2 Q. But you stopped reading right where I want
3 to direct your attention to. It's the middle of the
4 paragraph. The first word of the line is "The
5 parties agree that because it is too difficult to
6 track."

7 A. Yes.

8 Q. Do you want to just read that to yourself
9 for a minute.

10 A. Yes.

11 Q. Do you see the language that talks about an
12 overall reduced royalty rate?

13 A. I do.

14 Q. What was the overall reduced royalty rate,
15 or how much of a reduction was the -- was the rate?

16 A. There was no reduction.

17 Q. Then why does it say there was?

18 A. This is language -- and this was -- this
19 was -- this was -- this specific issue was
20 litigated. So this was language that was inserted
21 by -- by Trend during the final stages. I think
22 it's largely prophylactic language to support --
23 I've forgotten the exact legal, you know, reasoning
24 behind why they insisted on inserting this language.

25 Q. Okay. But you were aware of it when it was

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1 being inserted?

2 A. I read the agreement.

3 Q. You didn't assert in the litigation that it
4 was slipped in on you and nobody noticed?

5 A. No. It was -- it was in -- it was -- no,
6 I -- no.

7 Q. Okay. Stepping away first from the
8 document for a second, does Fortinet have a
9 preference, when it takes a license to other
10 parties' intellectual property, to take a paid-up
11 license versus a running royalty license?

12 MR. COOPER: Same objection; same
13 instruction.

14 THE WITNESS: So this sounds like a -- so a
15 Fortinet and a preference sounds like a -- similar
16 to the policy question. We -- we've only entered
17 a -- a number -- a very discrete number of
18 settlements. In this case, Fortinet preferred a
19 fully paid license.

20 MR. CUKOR: Q. In -- in the Trend Micro
21 case?

22 A. Yes.

23 Q. In the Trend Micro case, there was a
24 running royalty being paid?

25 A. Yes.

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1 Q. Oh, you would have preferred that you
2 didn't have to pay that?

3 A. Yes.

4 Q. Okay. Now I understand.

5 Is there any situation where Fortinet did
6 prefer to pay a running royalty as opposed to a
7 paid-up license?

8 MR. COOPER: Same objection; same
9 instruction.

10 THE WITNESS: I can't recall any situation
11 where -- where Fortinet proposed paying a running
12 royalty for any patent license.

13 MR. CUKOR: Okay.

14 MR. COOPER: Can we get a quick number on
15 how much time we've got left -- how much time we've
16 been on the record.

17 MR. CUKOR: Let's go off the record if you
18 want to do that.

19 THE VIDEOGRAPHER: Going off the record,
20 the time is 6:41 p.m.

21 (Recess taken.)

22 THE VIDEOGRAPHER: We are back on the
23 record. The time is 6:52 p.m.

24 MR. CUKOR: Q. How many times have you
25 been deposed before?

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1 A. I don't -- I don't recall the exact number.
2 Three or four times.

3 Q. Are you planning on coming to trial?

4 A. In the NPS case, if it goes -- assuming
5 that we -- there is a trial, I would at least attend
6 and watch.

7 Q. Okay. So you would be available to be
8 called as a witness if I wanted to call you as a
9 witness?

10 A. I'm planning to be in the area at that --
11 at that time.

12 Q. Okay. I put in front of you during the
13 break Exhibit 170, and I wanted to go back over page
14 6 of that with you.

15 A. Oh, okay.

16 Q. And I wanted to direct your attention to
17 the sale by Fortinet to Cisco of several patents and
18 applications listed on the bottom of page 6 and
19 continuing on to the top of page 7.

20 What was the technology that was generally
21 sold to Cisco?

22 A. I mean, it's -- it's the -- it's just
23 patents and patent applications, one or -- a couple
24 families here and a couple families there. I'd have
25 to open them up and look at them to say.

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1 Q. You don't recall what the technology
2 related to?

3 A. I can't recall the titles. I mean,
4 generally speaking, it was routing -- you know,
5 virtual routing technology, I would say.

6 Q. Okay. And why would Fortinet sell its
7 patents to a competitor?

8 MR. COOPER: Same objection; same
9 instruction.

10 THE WITNESS: You -- you previous --
11 previously asked if Cisco was a competitor, and I
12 indicated that -- you know, that there is overlap,
13 but it's limited. Cisco has a much broader business
14 base than Fortinet. But in the security space, we
15 do -- we do compete with Cisco. So I'm not sure
16 that they -- the characterization of Cisco -- just
17 the broad characterization of Cisco as a competitor
18 is accurate.

19 The question was why would we sell to a
20 competitor. But I guess the -- the -- the better
21 question would be why would we sell to Cisco.

22 And again, this was a fairly opportunistic
23 sale, that a broker identified a set of patents and
24 asked if -- if we would be willing to sell them, and
25 it ended up being a -- a set of patents that we

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1 looked at and determined that they were somewhat --
2 we were somewhat either overweight in that area
3 or -- you know, we were somewhat overweight. And so
4 they weren't patents that we necessarily needed to
5 hang on to. So it seemed like an opportune -- an
6 opportune sale.

7 MR. CUKOR: Q. They were not patents
8 related to your core technology?

9 A. In each case, we do have a license-back, I
10 believe, baked into the license agreement. But in
11 each case, whether it's the AST sale or the two
12 Cisco sales, I -- I did not do a review of the
13 patents relative to any Fortinet products.

14 Q. Did -- with regard to the AST sale or the
15 two Cisco sales, did those patents relate to UTM
16 firewalls?

17 A. Not specifically and obvious -- and sort of
18 overtly. I would need to look -- to answer
19 accurately, I would need to review each of -- each
20 of these. But they are more related, if I recall
21 correctly, to -- I mean, it's hard to make --
22 there's a lot -- there's a number of patents here.
23 There's a discrete number of families, but a number
24 of patents here.

25 So -- in -- in each case -- I -- there --

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1 none of these had -- were titled, you know, "UTM" or
2 "Firewall," would be my memory. I can't recall the
3 exact titles. I can actually -- yeah, I can't. I
4 mean, I just -- it's --

5 Q. It's okay.

6 A. Provisioning virtual routers are -- you
7 know, titles -- "Service Processing Switch" might
8 have been one title. I mean, I'm familiar with the
9 patents, and I would recognize if -- if I read them
10 fairly quickly, but I -- I can't recall the titles
11 just looking at the numbers.

12 Q. Okay. I noticed in the Cisco agreement
13 that there was a time of the essence clause when the
14 payment had to be paid by a certain time. Was that
15 in there because Fortinet needed the money?

16 MR. COOPER: Same objection; same
17 instruction.

18 THE WITNESS: What does it mean, to need
19 the money?

20 MR. CUKOR: Q. Did Fortinet have some need
21 to raise cash to cover expenses?

22 A. No.

23 Q. Did Fortinet want the money to use for a
24 specific purpose?

25 A. What -- can you remind me which one you're

1 asking about.

2 Q. The Cisco agreements.

3 A. Which Cisco -- ah, darn.

4 You writing down when I say "blah"?

5 Which Cisco agreement? You said -- or did
6 you say agreements?

7 Q. The December 17, 2012, one.

8 A. There was no specific -- there was no
9 specific need for the money. I think I did
10 communicate to Cisco that we might be more amenable
11 to, you know, a deal -- and again, we were
12 negotiating a price -- if it happened before the end
13 of the year. And -- but I think that was more akin
14 to simply, you know, end-of-quarter/end-of-year
15 revenue.

16 Q. Was F-Secure a firewall competitor?

17 A. I do not know the F-Secure product or
18 services line. My -- my understanding is that
19 they -- F-Secure is in, you know, the -- the
20 security space. I don't know the specifics of their
21 products.

22 Q. And were the patents that were sold or
23 licensed to F-Secure related to firewall technology?

24 A. The -- not specifically.

25 Q. Okay. Is Tuttle Lane on this -- on this

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1 chart?

2 A. Yes.

3 Q. Where is it?

4 A. AST.

5 Q. Oh, AST is Tuttle Lane? Okay. Thanks.

6 A. Is Google. So AST, you know -- you
7 probably know AST. Tuttle Lane, I believe, was an
8 entity that they had take assignment. And my
9 understanding is the ultimate assignment, if you
10 look at the assignment records, is Google.

11 Q. Okay.

12 MR. CUKOR: What's the next exhibit number?

13 THE REPORTER: 172.

14 MR. CUKOR: I'm going to mark as Exhibit
15 172 the assignment agreement between Fortinet and
16 Tuttle Lane.

17 (Plaintiff's Exhibit 172
18 marked for identification.)

19 MR. CUKOR: And I'll mark as 173 the U.S.
20 PTO assignment that's been Bates-labeled NPS 0050942
21 through 50958.

22 (Plaintiff's Exhibit 173
23 marked for identification.)

24 MR. CUKOR: Q. What's the date of the
25 assignment in Exhibit 172?

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1 A. It appears to be August 19, 2011.

2 Q. What's the title of the document?

3 A. "Assignment Agreement."

4 Q. And is it executed?

5 A. This agreement -- this copy of this
6 agreement appears to be a copy I received from the
7 assignee.

8 Q. So what was the effective date of this
9 assignment?

10 A. This -- the effective date is defined on
11 page 1 as August 19, 2011.

12 Q. Okay. I'm giving you Exhibit 173 now. And
13 can you confirm that Exhibit 173 is the assignment
14 documents that were recorded with the U.S. PTO?

15 A. I -- I've never seen these documents.

16 Q. Can you turn to NPS 0050955. Have you seen
17 that document before?

18 A. Well, it appears to be signed by me, so
19 presumably I've seen it before.

20 Q. And what was the date that you signed it?

21 A. I'm -- I'm not sure I can read the date.

22 Q. Could it be August 24th, 2011?

23 A. It could be. I -- I -- the -- the 4 is --
24 is not clear.

25 Q. Do you see the notary portion underneath

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1 your signature?

2 A. Yes. That is notarized on August 24th.

3 Q. Okay. And do you recall going before a
4 notary on August 24th?

5 A. No.

6 Q. Okay. And what is the title of this
7 document on page NPS 0050955?

8 A. This is Exhibit B, a Confirmatory Patent
9 Assignment Form in the United States Patent &
10 Trademark Office.

11 Q. And the next line?

12 A. Assignment.

13 Q. And is this a patent assignment?

14 A. I'm -- I'm not -- I can't recall this exact
15 document, even though I sent it. So -- and it's out
16 of context. You seem to have pulled it from the --
17 it seems to be connected to and pulled from this --
18 what appears to be a UT -- a U.S. PTO assignments on
19 the Web.

20 And for the technical patent assignments
21 with a PTO, I -- I generally just -- you know, I
22 leave that to outside counsel, and I just -- I --
23 you know, to the extent that I need to execute
24 documents, they instruct me.

25 Q. Well, you did sign this document, right?

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1 A. This is my signature, and this is
2 Joyce's -- I think this is Joyce, who is our person
3 in the office who does note -- notary services.

4 Q. Okay. And do you see in the second
5 paragraph or second full -- third full paragraph of
6 the document on page NPS 0050955, "Now, therefore,
7 in consideration"?

8 A. Oh, I do see that.

9 Q. Can you read that first line.

10 A. "Now, therefore, in consideration of the
11 sum of one dollar and other good and valuable
12 consideration."

13 Q. You can keep going. Finish that whole
14 sentence. Actually just the next line.

15 A. "Paid" -- "paid by assignee to assignor the
16 receipt and sufficiency of which is hereby
17 acknowledged."

18 Q. Does that refresh your recollection about
19 whether you've ever executed an assignment that
20 recited one dollar as consideration?

21 A. It -- it does. So I don't recall this
22 exact assignment, and I think I said previously that
23 the substantive agreement, which would be this type
24 of agreement, the substantive negotiated agreement,
25 would be the -- the -- the documents that I look at

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1 and negotiate and review and what I would speak to.
2 But the things that are filed with the U.S. PTO,
3 those technical formalities I largely leave to
4 outside counsel.

5 So I -- I -- I don't look at those, and I
6 don't understand how they're filed and recorded, so
7 I -- I don't recall this.

8 Q. Okay.

9 A. But I read it. I see it.

10 Q. And that dollar that's referenced in
11 Exhibit B that you've been reading of what's been
12 marked in this case as Exhibit 173, that bears no
13 relation on the value of the patents that were
14 assigned to Cisco, correct?

15 A. That's this one. I'm sorry. We're on
16 Tuttle Lane, aren't we? Is it -- do -- are you --
17 are you switching me back and forth?

18 Q. I'm sorry. No. I made a mistake. My
19 question was wrong. Thank you for catching it. Let
20 me ask it again.

21 The one dollar consideration that was
22 recited on NPS 0050955 does not relate in any way to
23 the value of the patents that were transferred by
24 Fortinet to Tuttle Lane, correct?

25 A. In this case, this is -- this is not my

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1 document and this confirmatory -- I don't know what
2 a confirmatory patent assignment form is. I suspect
3 this is a Tuttle Lane form that -- that I -- that we
4 were asked -- asked to execute. I -- I don't know
5 where this came from.

6 This I would call the substant- --
7 substant- -- the substantive agreement effecting the
8 transfer. And this agreement -- this is Tuttle
9 Lane, and I -- again, I note -- I mean, this appears
10 to be a Fortinet production, but it also appears to
11 be missing a page. The -- the second signature page
12 appears to be missing.

13 Q. The transfer to Tuttle Lane or AST was for
14 a sale price of about [REDACTED], correct?

15 A. Yes. Here it is on 149972, payment and
16 right of first refusal, consideration via assignment
17 of rights granted. Pursuant to Section 1, assignee
18 will pay to assignor [REDACTED].

19 Q. And that -- you're reading from Exhibit
20 172, correct?

21 A. I am reading that from Exhibit 172.

22 Q. So the document that you signed in Exhibit
23 173 that recites one dollar of consideration has
24 nothing to do with the value of the patents that
25 were transferred to AST or Tuttle Lane, correct?

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1 A. Well, let me just -- again, I -- I've said
2 I don't recognize this document even though I -- I
3 see my signature on it. Let me just compare. I --
4 I trust that you are correct.

5 Yeah. Yes, this seems to be related to --
6 this seems to be sort of the technical patent
7 assignment that would be filed -- I presume filed
8 with the U.S. PTO.

9 Q. So the one dollar that's recited in Exhibit
10 173 has no relation to the value of the patents that
11 were transferred to AST or Tuttle Lane, correct?

12 A. I would agree with that.

13 Q. And looking at page 2 of Exhibit 173, do
14 you see that there's an execution date section?

15 A. Page -- page 2?

16 Q. I'm sorry, the second page of Exhibit 173.

17 A. So this form, patent assignment. Again,
18 this is something I'm not familiar with, but I'm --
19 looking at this page, I see a row about six or eight
20 rows down that says, "Execution date."

21 Q. Right. And that is the -- what is the date
22 that's listed there?

23 A. The document says 8/19/2011.

24 Q. And is that the same date that's identified
25 as the effective date of Exhibit 172?

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1 A. The effective date of Exhibit 72 [sic] is
2 August 19, 2011.

3 Q. And if you flip back in Exhibit 173 to the
4 patent assignment that you signed, that was dated
5 August 24, 2011, correct?

6 A. This NPS 0050955, I see the notary date of
7 August 24, 2011.

8 Q. And the fact that you signed a patent
9 assignment on August 24, 2011, did not change the
10 fact that the patent was already assigned as of
11 August 19th, 2011, correct?

12 A. I mean, I think it depends on how you
13 interpret that. I mean, if I look at the agreement
14 that was filed -- I mean, there's a technical filing
15 I see with the U.S. PTO. Again, it's not something
16 I understand or have ever done. I just fill out
17 forms to complete the technicalities as I'm asked to
18 do so.

19 The agreement with an effective date of
20 August 19 is -- you know, is an agreement to assign.

21 Q. It is in fact an assignment, correct? It's
22 not an agreement to assign; it is an assignment?

23 A. This is an assignment agreement. I mean,
24 the agreement is what it is. I -- I don't want to
25 get into -- this was the agreement -- when was

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1 the -- I think we're just getting into the mechanics
2 of closing the transaction and payment of the
3 consideration and filing of the assignment.

4 Q. What was the date the patents were assigned
5 to Tuttle Lane?

6 A. I think it depends on what you mean. The
7 date that we signed this agreement here is
8 August 19th, 2011. And however you characterize
9 this agreement --

10 Q. Sure. Can you refer to the agreements by
11 their exhibit numbers so that the record is clear.

12 A. So Exhibit 172 is an assignment agreement,
13 and its effective date -- it is -- it appears to
14 be incomplete, and the signature date is not --
15 there's no signature by the date. I assume these
16 were exchanged -- signatures were exchanged, so
17 there's a page missing, you know, on that date. But
18 it does appear to be dated August 19, 2011. So this
19 assignment agreement was assigned at that date.

20 It provides that money will be transferred.
21 I don't recall the exact timing on the time that the
22 money will be transferred.

23 Q. Let me ask you this question: Could Tuttle
24 Lane have brought suit on the patents that were
25 assigned to it by Fortinet on August 19th, 2011?

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1 A. I think you're asking for a legal
2 conclusion. I suspect not until they perfected -- I
3 mean, again, you're asking for a legal conclusion.
4 Let me -- if I look at this -- I want to look at
5 some of the timing on how the -- when the
6 payments -- appointment, payment ...

7 Again, this -- this wasn't my form. This
8 is a -- an AST form agreement. There seems to be
9 additional obligations and further assistance in
10 effecting transfer of rights, so that this agreement
11 seems to envision a -- you know, a transfer rights
12 subsequent to this agreement and potentially further
13 assistance -- on the effective date -- there's an
14 obligation, on page 5 of Exhibit 172 ...

15 So I mean, the mechanics of completing the
16 assignment are baked in. Again, it's not my form.
17 You know, I think the agreement says what it says,
18 and I -- I don't know that I'd necessarily want to
19 go through the legal -- you know, sort of
20 instantaneous legal analysis on -- on this to say
21 what rights they had at what time.

22 (Plaintiff's Exhibit 174
23 marked for identification.)

24 MR. CUKOR: Q. Okay. Let me put in front
25 of you what's been marked as Exhibit 174. It's the

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1 Declaration of Todd Nelson in Support of Defendant's
2 Motion to Transfer Venue to the Northern District of
3 California.

4 Have you seen this document before?

5 A. Yes.

6 Q. And it concludes with your declaration
7 under penalty of perjury that it was true and
8 correct, correct?

9 A. Correct.

10 Q. Read into the record paragraph 4, please.

11 A. Paragraph 4 on the second page says:

12 "Fortinet maintains its source code
13 for the accused products under very tight
14 security at its headquarters in Sunnyvale,
15 California, and its offices in Vancouver,
16 British Columbia, Canada."

17 Q. Is that statement true?

18 A. I think it -- it -- it -- it could be true,
19 yes.

20 Q. It could be true is different than true.
21 So I'm asking you is it true?

22 A. So when you say its source code, earlier
23 today you were saying that -- we were asking this
24 FortiOS software that built the image, where was
25 that located, and that's located in British

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1 Columbia.

2 Fortinet in Sunnyvale is generally focused
3 on the -- the hardware side of the -- of the
4 FortiGate products, so something like our ASIC code
5 I believe is maintained in Sunnyvale, California.

6 So I think this is a little bit of a -- a
7 broad characterization of where -- depending on what
8 source code or design code that you're looking for,
9 where that would be. And it would be in either
10 California or Vancouver, British Columbia.

11 Q. The source code for the FortiGate products
12 is not kept in Sunnyvale, California, is it?

13 A. So I'm not sure what you're saying. So
14 when you say "the source code," I'm saying if I
15 interpret this to mean the -- the hardware designs,
16 the ASIC designs, those would be maintained in
17 California.

18 Q. And do you think that the -- that this
19 paragraph accurately represented to the Court where
20 the source code for the accused products was kept?

21 A. You know, I would -- I would need to go
22 back and ask -- I think, if I recall, at that time,
23 when I was doing -- when I was -- when I was filling
24 out this declaration in support of the motion to
25 dismiss, I was looking at the maintenance of

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1 databases relative to the accused products.

2 The questions earlier today were about our
3 FortiOS software source. The hardware -- the ha- --
4 ha- -- blah -- the hardware designs, the Verilog
5 code and the like I believe are largely maintained
6 in -- I think -- you know, that one -- the hardware
7 gets a little fuzzier, but I think that that's
8 primarily maintained in -- in -- in -- in Sunnyvale.

9 Q. Do you stand behind what you wrote to the
10 Court in paragraph 4?

11 A. Yeah, I -- I do. I do. I think that --
12 and on the software side -- on the software side, I
13 believe our IPS code -- I think our IPS code may be
14 maintained in Sunnyvale or it may be, like, an NFS
15 mount to a server in Vancouver.

16 So -- so the Sunnyvale develop- -- there
17 are some software developers. The -- the -- the
18 software -- the software -- it's -- it's a difficult
19 split. So in Sunnyvale, we have the developers for
20 the -- most of the non-FortiGate products, such --
21 such as the FortiDB and the FortiScan and the
22 Forti -- the -- the -- the FortiAuthenticator,
23 FortiCache, or whatever -- the other non-FortiGate
24 products are developed and maintained in Sunnyvale.

25 Q. But those are not accused products, right?

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1 A. Those are not accused products. The
2 FortiAP very well may be. I think the FortiAP,
3 that -- that group is in Sunnyvale, and those are
4 accused products. That's not FortiOS, so that -- I
5 believe that software would be in Sunnyvale.

6 And then the ASIC design -- so the products
7 come together in different places. The ASIC
8 designs, which are included in the bulk of the
9 FortiOS product -- the FortiGate family of products,
10 those -- those designs -- the ASIC design team I
11 believe is in Sunnyvale.

12 The IPS code design team at one point was
13 in Sunnyvale. I believe it's still in Sunnyvale.
14 There may be a split on that piece.

15 Q. Was it appropriate for you to tell the
16 Texas Court in support of your motion to transfer
17 this case to the Northern District of California
18 that the source code for the accused products was
19 maintained in Sunnyvale, California?

20 A. Yes.

21 Q. Okay. Take a look at paragraph 7. Is that
22 true?

23 A. "In addition, substantially all of
24 the testing, manufacturing" -- (reading
25 inaudibly) -- "and shipping of the accused

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1 product for the America" --

2 THE REPORTER: Okay. I can't take that
3 down.

4 THE WITNESS: Oh, I'm sorry.

5 THE REPORTER: Just letting you know.

6 THE WITNESS: "In addition
7 substantially all of the testing,
8 manufacturing, to the extent manufacturing
9 is performed in the Americas, and shipping
10 of the accused products for Americas region
11 occurs at Fortinet's Sunnyvale
12 headquarters."

13 Yes.

14 MR. CUKOR: Q. Does any manufacturing
15 occur in Sunnyvale?

16 A. Of the accused products? No. No
17 manufacturing of the accused products -- and I say
18 "to the extent manufacturing is performed in the
19 Americas" ...

20 Q. Is paragraph 7 true?

21 A. "Substantially all of the testing" --
22 (reading inaudibly) -- "performed in the
23 Americas, and shipping of the accused
24 products for the Americas regions" --

25 Yes, I believe this is true. Because when

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1 we're talking about -- I mean, as I said, the
2 contract manufacturers for the accused products are
3 all overseas, but for the Americas, they -- they do
4 hit and are shipped out of the America -- Americas
5 facilities.

6 So manufacturing -- there's -- there --
7 occasionally there's some spot-checking that's done.
8 I think that's actually handled in the Trend
9 license, and I think we actually carved it out as
10 sort of incidental manufacturing. There'll be sort
11 of spot-testing. It's very -- it's very limited,
12 where you open a box and do spot-testing.

13 For the most part, for the Americas, if
14 stuff comes from a contract manufacturer destined
15 for a U.S. distributor, to the extent that a box is
16 opened and power cables are inserted or
17 spot-testing -- functionality testing is done, that
18 would happen in making sure, in the U.S., prior to
19 shipping.

20 Q. But there's no manufacturing done in
21 Sunnyvale, correct?

22 A. The manufacturing of the -- the ancillary
23 products is done in the U.S.

24 Q. There's no manufacturing of the accused
25 products in Sunnyvale, correct?

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1 A. The accused products are contract
2 manufactured in China, Taiwan, Canada, and I think
3 one is in Germany.

4 Q. So there is no manufacturing of the accused
5 products in Sunnyvale, California, right?

6 A. No, it depends on how you define this. And
7 this is something we argued very carefully over
8 during the -- and I was probably -- and I was
9 sensitized to this issue during the Trend litigation
10 because we specifically sort of carved this out.

11 We said, you know, what do you -- at what
12 point does it rise to the threshold of doing
13 manufacturing. The accused products, as I
14 understand, them, you know, they are shipped through
15 the U.S., and the -- the products for the U.S. would
16 come through the -- the U.S. manufacturing
17 department.

18 I did talk to our person in manufacturing
19 at -- in preparation for this deposition today to
20 find out exactly what products were manufactured in
21 Sunnyvale and to confirm that the contract
22 manufacturers were all overseas and to understand
23 sort of the incidental sort of testing and
24 repackaging that -- that was done in -- in the
25 Americas.

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1 Q. Okay. Can you look at paragraph 8. You
2 wrote to the Court that Fortinet did not maintain
3 any facilities, employees or documents in the
4 Eastern District of Texas, correct?

5 A. I see that, yes.

6 Q. Did it later turn out that Fortinet did
7 have employees in the Eastern District of Texas?

8 A. I don't know.

9 Q. Do you remember submitting a supplemental
10 declaration?

11 A. No.

12 MR. CUKOR: This will be the last document
13 I show you. Let's mark as Exhibit 175 the
14 Supplemental Declaration of Todd Nelson in Support
15 of Defendant's Motion to Transfer Venue to the
16 Northern District of California.

17 (Plaintiff's Exhibit 175
18 marked for identification.)

19 MR. CUKOR: Q. Look at paragraph 3 of
20 Exhibit 175, please.

21 A. Can I -- I want to -- this has been a
22 while, so I -- I'd like to sort of review briefly
23 just to refresh my recollection.

24 Okay.

25 Q. Looking at paragraph 3 of the document

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1 that's been marked as Exhibit 175 in this case, do
2 you see you wrote:

3 "As stated in my previous declaration,
4 Fortinet does not maintain any facilities
5 or documents in the Eastern District of
6 Texas."

7 Do you see that?

8 A. I do.

9 Q. Do you see absent from that sentence is
10 "employees"?

11 A. Yes.

12 Q. And I want to refer you back to paragraph 8
13 of Exhibit 174.

14 A. Okay.

15 Q. In that paragraph you told the Court that
16 Fortinet did not maintain any employees in the
17 Eastern District of Texas, correct?

18 A. Yes.

19 Q. Did that turn out to be not true?

20 A. You know, I can't recall the circumstances
21 at the time. I believe that when I investigated at
22 this time, I was not able to locate any employees.
23 I don't know if we have new employees. We're
24 growing quite quickly. But apparently there were a
25 few employees that did show up, I believe working

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1 from home, if I -- if I remember the facts. I
2 haven't read all of this.

3 Two -- so I have reviewed plaintiff's
4 opposition motion. This is on page 2 of Exhibit
5 175. So I've reviewed plaintiff's opposition to
6 defendant's motion to transfer venue.

7 Q. You can read to yourself whatever you need
8 to read to -- in order to answer my question.

9 A. In particular, the section which plaintiff
10 claims to have identified four current and two
11 former employees located in the Dallas area.

12 So -- so it looks like there are two
13 employees that I missed in my prior search for
14 employees that I found when we filed this
15 supplement, and this was providing some detail
16 around the two that I found and then I guess two
17 that I was unable to find.

18 Q. Okay. Turning your attention back to
19 Exhibit 174. As an officer of the court, do you
20 think it was appropriate to tell the Court in Texas
21 that Fortinet maintains its source code for the
22 accused products in Sunnyvale, California?

23 A. I do.

24 Q. And as an officer of the court, did you
25 think it was appropriate -- or do you think it was

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1 appropriate for you to tell the Court in Texas that
2 all of the manufacturing -- substantially all of the
3 manufacturing of the accused products for the
4 Americas occurs at Fortinet's Sunnyvale
5 headquarters?

6 A. Well, that's not what I say. And I think
7 the qualification I put in here was to -- was to
8 essentially say that to the extent -- to the extent
9 manufacturing is performed, and I was specifically
10 referring to sort of the limited testing and
11 manufacturing that -- that does occasionally occur.

12 Q. So you completely stand behind your
13 statement in paragraph 7 and believe that it was
14 appropriate to tell the Court that?

15 A. I believe I do. Again, I'm not in
16 manufacturing. So when I'm asked to -- when I'm
17 asked questions and I'm asked, I -- I -- I do an
18 investigation. I talk to manufacturing people. I
19 try to understand the -- the activities that are
20 being performed, and I try to, you know, accurately
21 characterize those.

22 Q. You didn't have any trouble explaining that
23 there was no manufacturing done in Sunnyvale when I
24 asked you earlier about that today, did you?

25 A. Well, I prepared for this deposition in the

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1 same way. Will my preparation be perfect? I
2 don't -- you know, I doubt it. I kept saying, you
3 know, on revenue Jim Bray would be much more
4 authoritative than me. On engineering, some of the
5 engineering resources would be more authoritative
6 than me. And the source code itself would
7 absolutely be the absolute authority.

8 Q. But you didn't make any such qualifications
9 when I asked you if there was any manufacturing done
10 in Sunnyvale, did you?

11 A. I went to -- I went to multiple people in
12 operations and manufacturing, both in Vancouver and
13 Sunnyvale, went specifically through the entire list
14 of accused products and asked them where the
15 contract manufacturers are.

16 I obtained a list of all of the accused
17 products with the location of the -- of the contract
18 manufacturers. And that's the current contract
19 manufacturers. That changes rapidly.

20 And those -- and if you look through that
21 list, it's China and Taiwan and Canada and in one
22 case Germany.

23 Q. Do you think --

24 MR. COOPER: Excuse me. Real quick. I
25 believe we're getting very close to the seven-hour

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1 mark.

2 THE VIDEOGRAPHER: We're over by eight
3 minutes.

4 MR. COOPER: We're over by eight minutes?
5 Okay. I'm going to instruct the witness
6 not to --

7 MR. CUKOR: I have --

8 MR. COOPER: -- answer any more questions
9 pursuant to our agreement for now. We can go off
10 the record. I'll come back, and we can talk about
11 whether the witness will continue to answer
12 questions. We're over the seven-hour limit which
13 the parties agreed to.

14 THE VIDEOGRAPHER: Off the record. The
15 time is 7:41 p.m.

16 (Recess taken.)

17 THE VIDEOGRAPHER: Back on the record. The
18 time is 7:48 p.m.

19 MR. COOPER: Just noting that the
20 deposition's now over.

21 THE VIDEOGRAPHER: Okay.

22 MR. CUKOR: You're not going to allow the
23 witness to answer any more questions, correct?

24 MR. COOPER: Pardon me?

25 MR. CUKOR: You're not allowing the witness

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1 to answer any more questions?

2 MR. COOPER: We have exceeded the
3 seven-hour limit and the deposition is now over.

4 MR. CUKOR: Okay.

5 THE VIDEOGRAPHER: Okay. So this concludes
6 the deposition of Todd Nelson. The number of tapes
7 used is four. We are off the record. The time is
8 7:48 p.m.

9 (Deposition concluded at 7:48 p.m.)

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1 REPORTER CERTIFICATE

2 I hereby certify that TODD NELSON was by
3 me duly sworn to testify to the truth, the whole
4 truth and nothing but the truth in the
5 within-entitled cause; that said deposition was
6 taken at the time and place herein named; that the
7 deposition is a true record of the witness's
8 testimony as reported to the best of my ability by
9 me, a duly certified shorthand reporter and a
10 disinterested person, and was thereafter transcribed
11 under my direction into typewriting by computer;
12 that request [] was/ [X] was not made to read and
13 correct said deposition.

14 I further certify that I am not interested
15 in the outcome of said action, nor connected with,
16 nor related to any of the parties in said action,
17 nor to their respective counsel.

18 IN WITNESS WHEREOF, I have hereunto set my
19 hand this 28th day of June, 2013
20

21

22 HOLLY MOOSE, CSR NO. 6438

23

24

25

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